SUPREME COURT, U.S.
FILED
NOV 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5002

In The

Supreme Court of the United States

October Term, 1987

ELLIS T. McCOY, ETC.,

Appellant,

vs.

WISCONSIN COURT OF APPEALS, DISTRICT I,

Appellee

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JOINT APPENDIX

LOUIS B. BUTLER, JR.
Assistant Wisconsin
Public Defender
819 North Sixth Street,
Room 821
Milwaukee, Wisconsin 53203
(414) 227-4891
Counsel for Appellant

DONALD J. HANAWAY
Attorney General
State of Wisconsin

JAMES H. McDERMOTT
Assistant Attorney General

DAVID C. RICE
(Counsel of Record)
Assistant Attorney General

Wisconsin Dept. of Justice
Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-6823
Counsel for Appellee

Statement As to Jurisdiction filed May 22, 1987
Probable Jurisdiction Noted October 5, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries ..... J.A. 1

Motion to Determine Constitutionality of Rule 809.32(1) and to Clarify Scope of Attorney's Representation on Appeal dated August 14, 1984 ..... J.A. 4

September 7, 1984 Order of Wisconsin Court of Appeals ..... J.A. 8

Brief of Defendant-Appellant in Case No. 84-929-CR filed October 22, 1984 ..... J.A. 11

October 22, 1984 Letter to McCoy from Clerk of Court of Appeals ..... J.A. 28

April 16, 1985 Order of Wisconsin Court of Appeals ..... J.A. 29

Petition for Supervisory Writ of Prohibition and Declaration of Relator's Rights dated April 23, 1985 ..... J.A. 31

May 8, 1985 Order of Wisconsin Supreme Court ..... J.A. 37

Motion to Determine Constitutionality of Rule 809.32(1) and to Clarify Scope of Attorney's Representation on Appeal dated June 4, 1985 ..... J.A. 39

Order Amended January 16, 1986 of the Wisconsin Court of Appeals ..... J.A. 45

Petition for Supervisory Writ of Prohibition and Declaration of Relator's Rights dated January 21, 1986 ..... J.A. 48

Response to Petition for Supervisory Writ of Prohibition and Declaration of Relator's Rights and Supporting Memorandum filed March 6, 1986 ..... J.A. 56

TABLE OF CONTENTS—Continued

Page

March 27, 1986 Order of Wisconsin Supreme Court ..... J.A. 106

April 9, 1987 Decision of Wisconsin Supreme Court ..... J.A. 108

May 21, 1987 Notice of Appeal Filed ..... J.A. 126

October 5, 1987 Order of the Supreme Court of the United States Noting Probable Jurisdiction and Leave to Proceed in forma pauperis ..... J.A. 128

RELEVANT DOCKET ENTRIES

	Date
Motion to Determine Constitutionality of Rule 809.32(1) and to Clarify Scope of Attorney's Representation on Appeal filed with Wisconsin Court of Appeals	Aug. 16, 1984
Order of Wisconsin Court of Appeals denying motion entered	Sept. 7, 1984
No-Merit Brief of Defendant-Appellant in Case No. 84-929-CR-NM filed with Wisconsin Court of Appeals	Oct. 22, 1984
Letter from Clerk of Court of Appeals to Ellis T. McCoy noting receipt of brief and allowing for response to be filed	Oct. 22, 1984
Order of Wisconsin Court of Appeals striking brief of Defendant-Appellant for noncompliance with Rule 809.32(1) entered	April 16, 1985
Petition for Supervisory Writ of Prohibition and Declaration of Relator's Rights filed in Wisconsin Supreme Court as Case No. 85-0781-W	April 24, 1985
Order of Wisconsin Supreme Court in Case No. 85-0781-W denying petition entered	May 8, 1985
Motion to Determine Constitutionality of Rule 809.32(1) and to Clarify Scope of Attorney's Representation on Appeal filed with Wisconsin Court of Appeals	June 4, 1985

RELEVANT DOCKET ENTRIES—Continued

	Date
Order of Wisconsin Court of Appeals denying motion and ordering new brief entered	Jan. 15, 1986
Amended Order of Wisconsin Court of Appeals denying motion and ordering new brief entered	Jan. 16, 1986
Petition for Supervisory Writ of Prohibition and Declaration of Relator's Rights filed in Wisconsin Supreme Court as Case No. 86-0172-W	Jan. 24, 1986
Order of Wisconsin Supreme Court for Court of Appeals, District I, to respond to petition entered	Feb. 21, 1986
Response to Petition for Supervisory Writ of Prohibition and Declaration of Relator's Rights and Supporting Memorandum filed	March 6, 1986
Order of Wisconsin Supreme Court granting petition for declaratory judgment entered	March 27, 1986
Brief-and-Appendix of Petitioner filed in Wisconsin Supreme Court	May 19, 1986
Brief of Respondent filed in Wisconsin Supreme Court	June 20, 1986
Reply Brief of Petitioner filed in Wisconsin Supreme Court	July 3, 1986

RELEVANT DOCKET ENTRIES—Continued

	Date
Amicus Curiae Brief of Wisconsin Association of Criminal Defense Lawyers filed in Wisconsin Supreme Court	Nov. 28, 1986
Oral Argument in Wisconsin Supreme Court	Jan. 5, 1987
Decision of Wisconsin Supreme Court entered	April 9, 1987

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1

Case No. 84-929-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELLIS T. McCOY,

Defendant-Appellant.

MOTION TO DETERMINE CONSTITUTIONALITY OF RULE 809.32(1) AND TO CLARIFY SCOPE OF ATTORNEY'S REPRESENTATION ON APPEAL

Now comes the above-named defendant, Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, and hereby moves this court for an order determining the constitutionality of Rule 809.32 (1) and to clarify the scope of the attorney's representation, pursuant to Rule 809.14, on the following grounds:

1. On January 24, 1984, the above-name attorney was appointed to represent the above-named defendant for purposes of appeal. The final transcript was filed April 5, 1984, and a notice of appeal was filed May 4, 1984.

2. After doing research in preparation for filing the brief in this action, which would be due on August 20, 1984 pursuant to Rule 809.30(1)(f) and an extension granted by this court on July 24, 1984, this attorney has concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any argu-

able merit within the meaning of *Anders of California,* 386 U.S. 738 (1967) and Rule 809.32(1).

3. This attorney discussed the matter by telephone with Mr. McCoy on August 10 and 13, 1984. Mr. McCoy was advised that his options included voluntarily dismissing the appeal, proceeding with the appeal *pro se* or requiring this attorney to file a no merit report. Mr. McCoy has asked this attorney to file a no merit report.

4. The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

386 U.S. at 745.

5. The Wisconsin Supreme Court, consistent with *Anders,* has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State,* 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972).

6. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders,* the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

7. While it is clear pursuant to *Anders* that a no merit brief is required when an attorney reaches that determination and the defendant wishes to pursue his or her appeal, defendant submits that the portion of sec. 809.32 (1) which requires a discussion of why the appeal lacks merit would infringe on defendant's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by *Anders,* but would be in the awkward position of arguing why his client's appeal lacks merit. This would be contrary to the mandate of *Anders* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant submits that a discussion of why any issue lacks merit would violate the sixth amendment.

8. Defendant submits that a no merit report consistent with *Anders* and with the remainder of Rule 809.32(1) would protect the interests of the client while informing the court that further proceedings would be frivolous. The attorney would be able to present the court with any issue which might arguably support the appeal, giving the court, not counsel, an opportunity to decide whether the appeal is frivolous. Such a procedure would not put the attorney in the position of arguing against his client.

9. This attorney, while believing the portion of Rule 809.32(1) which requires a discussion of why the issue lacks merit to be unconstitutional, will file whatever type of no merit report this court determines to be appropriate. This attorney suggests that the order determining the constitutionality of the challenged portion of the Rule be published. The no merit report will be due on October 2, 1984, based on the service of the transcripts, not including the time that is tolled due to the filing and determination of this motion.

WHEREFORE, this attorney respectfully requests that this court determine the constitutionality of that portion of 809.32(1) which requires a discussion of why any issue lacks merit, and clarify the scope of this attorney's representation on appeal.

Dated this 14 day of August, 1984.

Respectfully submitted,

/s/ LOUIS B. BUTLER, JR.
Assistant State Public Defender

Attorney for Defendant-Appellant.

DISTRICT I

Office of the Clerk
COURT OF APPEALS
Of Wisconsin

Madison, September 7, 1984

(Title omitted in printing)

ORDER

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

The defendant, by his attorney, has moved the court for an order determining the constitutionality of Rule 809.32(1), Stats., and clarifying the scope of an attorney's representation in cases where the attorney concludes that further appellate proceedings on behalf of his client would be frivolous and without arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967). The defendant's counsel states that he believes that the portion of Rule 809.32(1) which requires a discussion of why the appeal lacks merit infringes on the defendant's sixth amendment right to counsel, but that he will file whatever type of no merit report this court determines to be appropriate.

The motion is denied. The general rule is that courts do not decide abstract principles of law, *City of Racine v. J-T Enterprises of America, Inc.,* 64 Wis.2d 691, 700, 221

N.W.2d 869, 874 (1974), or render advisory opinions, *Smith v. Pershing,* 10 Wis.2d 352, 357, 102 N.W.2d 765, 768 (1960). Judicial restraint dictates not passing on an issue until the facts of the proper case present a justiciable controversy. *State ex rel. Deisinger v. Treffert,* 85 Wis.2d 257, 271, 270 N.W.2d 402, 409 (1978). A justiciable controversy constitutes a controversy in which a claim of right is asserted against one who has an interest in contesting it. *Pension Management, Inc. v. DuRose,* 58 Wis.2d 122, 128, 205 N.W.2d 553, 555 (1973). The justiciable controversy requirement compels the courts to refuse to determine hypothetical or future rights. *See id.* at 128, 205 N.W.2d at 555-56.

Based on these standards, we conclude that the relief requested in the motion should not be granted. The motion in effect requests this court to render an advisory opinion informing the defendant's counsel of whether this court would conclude that a no merit report filed in accordance with Rule 809.32(1) deprived the defendant of assistance of counsel as required by the sixth amendment to the U.S. Constitution. Since a no merit report has not yet been filed, the defendant has not and cannot yet claim that he was deprived of his right to assistance of counsel. Consequently, no justiciable controversy exists involving the constitutionality issue. The constitutionality issue therefore cannot properly be addressed by this court at this time.

Upon the foregoing reasons,

IT IS ORDERED that the motion to determine the constitutionality of Rule 809.32(1), Stats., and to clarify the scope of representation is denied.

Marilyn L. Graves,
Clerk of Court of Appeals

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 84-929-CR

(Title omitted in printing)

BRIEF OF DEFENDANT-APPELLANT

LOUIS B. BUTLER, JR.
Assistant State Public Defender

230 West Wells Street, Room 500
Milwaukee, Wisconsin 53203

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ISSUES PRESENTED	4
POSITION ON ORAL ARGUMENT AND PUBLICATION	5
STATEMENT OF FACTS	6
ARGUMENT	11
I. THE FAILURE TO CONDUCT THE APPROPRIATE TEST TO DETERMINE WHETHER DEFENDANT HAD GONORRHEA RESULTED IN THE DESTRUCTION OF EVIDENCE MATERIAL TO THE DEFENSE.	11
II. THE TAKING OF BLOOD, HAIR, SALIVA AND GONORRHEA TEST SAMPLES OUTSIDE THE DEFENSE ATTORNEY'S PRESENCE, FOLLOWING AN *EX PARTE* PROCEEDING WHEN THE SEARCH WARRANT WAS APPLIED FOR, VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.	12
III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION.	14
IV. THE SENTENCE IN THIS ACTION IS EXCESSIVE.	15
CONCLUSION	16

CASES CITED

Anders v. California, 386 U.S. 738 (1967)	*passim*
Armstrong v. Collier, 536 F.2d 72 (5th Cir. 1976)	11
Brewer v. Williams, 430 U.S. 387 (1977)	12
Cleghorn v. State, 55 Wis. 2d 466, 198 N.W.2d 577 (1972)	3

	Page
Franks v. Delaware, 438 U.S. 154 (1978)	13
Johnston v. Pittman, 731 F.2d 1231 (5th Cir. 1984)	11
Ocanas v. State, 70 Wis. 2d 179, 233 N.W.2d 457 (1975)	15
Schmerber v. California, 384 U.S. 757 (1966)	13
State v. Amundson, 69 Wis. 2d 554, 230 N.W.2d 775 (1975)	11
State v. Baldwin, 101 Wis. 2d 441, 204 N.W.2d 742 (1981)	14
State v. Gustafson, 119 Wis. 2d 676, — N.W.2d — (1984)	14
State ex rel. Lyons v. DeValk, 47 Wis. 2d 200, 177 N.W.2d 106 (1970)	12
Syvock v. State, 61 Wis. 2d 411, 213 N.W.2d 11 (1973)	15
United States v. Bryant, 142 U.S. App. D.C. 132, 439 F.2d 642 (D.C. Cir. 1971)	11
United States v. Crowder, 543 F.2d 312 (1975) *cert. denied*, 429 U.S. 1062 (1977)	13

STATUTES CITED

Wisconsin Statutes	
Rule 809.32(1)	1, 16
Sec. 940.32(1)	6
940.225(a) and (2)(e)	6
968.21	13

OTHER AUTHORITIES CITED

S.C.R. 20.34(1)(c) and (2)(a)	2, 4

INTRODUCTION

This attorney has concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967) and Rule 809.32(1). The following brief has been prepared in compliance with *Anders.* However, because this attorney believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is directly contrary to *Anders* and unconstitutional, this attorney cannot ethically take a position which would argue against his client or act as *amicus curiae. See* S.C.R. 20.34(1)(c) and (2)(a) (1984).

The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

386 U.S. at 745.

The Wisconsin Supreme Court, consistent with *Anders,* has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State,* 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972).

Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders,* the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

While it is clear pursuant to *Anders* that a no merit brief is required when an attorney reaches that determination and the defendant wishes to pursue his or her appeal, defendant and this attorney submit that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on defendant's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by *Anders,* but would be in the awkward position of arguing why his client's appeal lacks merit. This would be contrary to the mandate of *Anders*

that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant and this attorney submit that a discussion of why any issue lacks merit would violate the sixth amendment.

Defendant and this attorney submit that a no merit report consistent with *Anders* and with the remainder of Rule 809.32(1) would protect the interests of the client while informing the court that further proceedings would be frivolous. This attorney would be able to present the court with any issue which might arguably support the appeal, giving the court, not counsel, an opportunity to decide whether the appeal is frivolous. Such a procedure would not put the attorney in the position of arguing against his client. This attorney has therefore prepared this brief in compliance with *Anders*, and the brief will not include a discussion of why any issue lacks merit. This approach fulfills this attorney's ethical obligation to protect his client's sixth amendment right to counsel on appeal. S.C.R. 20.34(1)(c) and (2)(a) (1984).

ISSUES PRESENTED

1. Did the failure by the nurse at the House of Correction to give defendant the correct test to determine whether he had gonorrhea violate his right to due process and a fair trial when the test was pursuant to a search warrant?

Trial court answered: No.

2. Did the *ex parte* hearing on the application for a search warrant and the execution of the search warrant at

the jail outside attorney's presence violate defendant's sixth amendment right to counsel?

Not answered by the trial court.

3. Was the evidence presented at trial sufficient to support a conviction for one count of second degree sexual assault and one count of abduction?

Trial court answered: Yes.

4. Was the sentence excessive?

Not answered by the trial court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This is an *Anders* brief, and as such, is not usually appropriate for publication. Nevertheless, because a portion of Wisconsin's No Merit Rule may be unconstitutional, a decision by this court would either modify the existing rule or clarify it. Accordingly, publication would be warranted.

Because of the complex nature of the question of an attorney's responsibility when the client wishes to pursue a no merit appeal, oral argument is requested as to how a no merit report should be prepared.

STATEMENT OF THE CASE

This matter is before the court on appeal, pursuant to Rule 809.32(1), from the judgment of conviction and sentence entered December 2, 1983, of the appellant, in circuit court, Milwaukee County, Honorable William A. Jennaro presiding. Appellant McCoy (hereinafter "defendant")

was convicted of one count of second degree sexual assault, contrary to sec. 940.225(2)(a), and one count of abduction, contrary to sec. 940.32(1), Stats.

Upon conviction, defendant was sentenced to six years, each count, to be served consecutively at the Dodge Correctional Institute at Waupun.

STATEMENT OF FACTS

Ellis T. McCoy was charged with one count of second degree sexual assault and one count of abduction, contrary to secs. 940.225(2)(e) and 940.32(1), Stats. (2: 1-2).

On July 8, 1982, the state applied for a search warrant to obtain blood, saliva, head and pubic hair and a test for the possibility of venereal disease from the defendant (23: 2). A Detective Doyle learned that the victim, C.D., contracted gonorrhea as a result of the attack (23: 5). The state asserted that there is a possible leaving behind of seminal fluid from the assailant to the victim, and that a blood type could be determined from the fluid (23: 6). For comparison purposes, the Wisconsin Regional Crime Laboratory would need a blood sample, pubic and head hair samples and saliva (23: 7). Because Mr. McCoy was in custody, the test could be taken in the nurse's office of the Milwaukee County Jail by the nurse (23: 7). The officer testified that the nurse had taken numerous samples from other persons in the past (23: 7), and had training and experience in taking those samples. (23: 8).

The court found probable cause for the issuance of the search warrant to obtain, under medical supervision by a doctor or nurse qualified to perform the functions, the various samples (23: 9-10). The warrant specifically authorized the taking of blood and saliva samples, head and pubic hair samples and appropriate testing for gonorrhea by the nurse "pursuant to approved medical procedures" (22: 1). The transcript reflects that no appearance was made by the defendant or his attorney at the hearing (23: 1), which occurred July 8, 1982, after the preliminary hearing of June 19, 1982 (10: 1, *et seq*).

After receiving a doctor's report from Atlanta, the state decided to proceed with the prosecution (12: 3-4). The assistant district attorney thought that the medical evidence or opinions would dispose of the case, but found that they did not because the wrong test was performed (12: 3-4).

At trial, Nurse Mary Schuknecht of the County Jail testified that she came in contact with Ellis McCoy on July 8, 1982 pursuant to a search warrant (14: 25). She collected blood, saliva, head and pubic hair samples and conducted a test normally done by the jail for gonorrhea (14: 26). That test involved taking a swab of the urethra, putting it on a lab slide and sending it to the Milwaukee Health Department (14: 26). There were no facilities in the County Jail to take gonorrhea samples to be used for a culture as opposed to the slide analysis on that date (14: 27). All that was needed was a culture medium container (14: 29).

The results from the test that was done was negative for gonorrhea (14: 29).

Robert Bagley, a bacteriologist for the City of Milwaukee Health Department, testified that a culture was the preferred procedure for gonorrhea testing because it was a specific test for gonorrhea (14: 31-32). The "gram

stain" slide method at best was only presumptive evidence of gonorrhea (14: 31-32, 35-36).

The test performed on Mr. McCoy was largely inconclusive (14: 35-36). There were very few cells on the slide resembling gonorrhea (14: 38-40).

Dr. Michael Dailey testified that it was not always necessary to receive treatment in order to get rid of gonorrhea (14: 49). One can shed the organism by going to the bathroom (14: 49-50).

The victim, C.D., had gonorrhea (14: 50). The testing of Mr. McCoy does not establish either way whether he had gonorrhea or not (14: 54). That is because of the possibility of error due to the slide test (14: 57). A culture would have been the appropriate test (14: 58).

Mary Beth Varriale testified that the vaginal swab of C.D. was negative for the presence of semen or spermatozoa (15: 76). Nc seminal stains were found on a pair of her blue panties, and the only hair found on the panties belonged to C.D. (15: 77-78). However, another pair of panties had a stain containing intact spermatozoa (15: 79). Ms. Varriale attempted to individualize the stain as to the A, B, or O blood group of the person who contributed the semen, but the results were inconclusive (15:81). She did not find any of Mr. McCoy's hair or saliva on the victim's clothing (15: 85).

C.D. testified that at approximately 10:00 p.m. she received a phone call from the defendant (15: 92). He asked if her sister and mother were home, and when she said no, he asked if he could come by and help plan a birthday party for his girlfriend (15: 94). C.D. told him

he could not come over (15: 95). She called her mother on the phone and told her she was scared, so her mother told her to lock the doors and go upstairs (15: 96).

Five minutes later, C.D. saw Mr. McCoy standing outside a window (15: 96-97). McCoy rang the doorbell, and C.D. told him to leave, but he would not leave (15: 99). McCoy told that he was planning a surprise party for his girlfriend and wanted a pencil and paper (15: 101). He also wanted a kiss (15: 102). She gave him the paper and locked the door (15: 103-104). Five minutes later, she looked to see if he had gone, opening the door (15: 104). McCoy grabbed her, took her to the car, drove to a dark place and assaulted her (15: 106-114). Her glasses were knocked off during the struggle (15: 106-107).

After the assault, McCoy went to a gas station to get gas (15: 211). There were other people at the station, but C.D. did not get out of the car or run away, nor did she tell anyone else she had been assaulted (16: 224). He told her not to tell anyone (16: 235). He also called later to ask her if she was alright and told her to take a shower (16: 249).

Detective Patrick Doyle, after arriving at the victim's home found a package of Salem cigarettes and a lense and the left bow for C.D.'s eyeglasses in the yard (17:5).

Ellis McCoy admitted going to C.D.'s house and taking her to the gas station (17: 36-39). He denied sexually touching C.D. (17: 44-45). He also has a defect in his right arm which prevents him from lifting anything heavy (17:65).

Leo Draveling, who used to live with the victim's mother, was of the opinion that C.D. was untruthful, and

that her fourth grade teacher and superintendent of her school were of the same opinion (17: 87, 90-93).

The trial court in evaluating the evidence[1] recognized that the gonorrhea test done was unsatisfactory but found nevertheless that the defendant was guilty beyond a reasonable doubt (17: 133-137). Upon conviction, Mr. McCoy was sentenced to indeterminate terms of not more than six years, each count, consecutive to each other, for the abduction and sexual assault charges (18: 14).

Further facts will appear in the argument.

ARGUMENT

I. THE FAILURE TO CONDUCT THE APPROPRIATE TEST TO DETERMINE WHETHER DEFENDANT HAD GONORRHEA RESULTED IN THE DESTRUCTION OF EVIDENCE MATERIAL TO THE DEFENSE.

The Wisconsin Supreme Court has ruled that the destruction of evidence material to the defense violates due process. *State v. Amundson,* 69 Wis. 2d 554, 577-580, 230 N.W.2d 775, 788 (1975). In reaching its decision, the court adopted the reasoning set forth in *United States v. Bryant,* 142 U.S. App. D.C. 132, 439 F.2d 642 (D.C. Cir. 1971).

Other decisions which have adopted the *Bryant* reasoning have set forth a three-pronged test to determine whether the destruction of material evidence violates due process: (1) the state's bad faith or negligence; (2) the

---

[1] The jury had been waived by the defendant against counsel's advice mid-trial (15: 64-67).

importance of the evidence; and (3) the other evidence of guilt adduced at trial. *Johnston v. Pittman,* 731 F.2d 1231, 1234 (5th Cir. 1984); and *Armstrong v. Collier,* 536 F.2d 72, 78 (5th Cir. 1976). Applying this test to the facts of this case, there can be no doubt that the failure to conduct the correct gonorrhea test was due to the state's negligence, as the trial court indicated that the test conducted was unsatisfactory (17: 133-137). There can also be no question that the correct test was material and important to the defense, as the victim had gonorrhea and the inconclusive test indicated that there was no presence of gonorrhea in the defendant (14: 29, 31-36, 38-40, 50). If the defendant did not have gonorrhea, then not only did he probably not commit the assault on the victim, but the victim would now have a motive for falsely accusing defendant in order to explain how she contracted gonorrhea in the first place. *State ex rel. Lyons v. DeValk,* 47 Wis. 2d 200, 204-206, 177 N.W.2d 106 (1970). Thus, the only question to be determined is whether the other evidence at trial was so lacking that the defendant was deprived of due process.

Defendant submits that absent the correct test for gonorrhea, the remaining evidence at trial is so lacking in probative value that a sufficient question has been raised as to whether he had gonorrhea. Defendant submits that if he did not have the disease, then he could not have committed the offense. Therefore, a new trial should be ordered as to both counts.

II. THE TAKING OF BLOOD, HAIR, SALIVA AND GONORRHEA TEST SAMPLES OUTSIDE THE DEFENSE ATTORNEY'S PRESENCE, FOLLOWING AN *EX PARTE* PROCEEDING WHEN THE SEARCH WARRANT WAS APPLIED FOR, VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

The complaint in this action was filed June 21, 1982. The information in this action was filed June 29, 1982 (3: 1). Thus, the defendant's sixth amendment right to counsel attached, as formal charging had already taken place. *Brewer v. Williams,* 430 U.S. 387, 398 (1977).

The search warrant proceeding took place July 8, 1972 (23: 1, *et seq.*). The record reflects that no appearance was made by defendant or counsel at the hearing (23: 1). Moreover, there is nothing in the record to indicate that defense counsel was present when the warrant was executed at the jail.

Sec. 971.04 provides the defendant has a right to be present at any evidentiary hearing. Evidence was taken during the search warrant proceeding, yet neither defendant nor counsel were present. Thus, defendant submits that his sixth amendment right to counsel and his statutory right to be present were violated when the proceedings were conducted *ex parte.*

Defendant recognizes that normally, pre-search proceedings are *ex parte* and conducted in secrecy, as the subject of the search should not be tipped off to the application lest he destroy or remove evidence. Sec. 968.21. *See Franks v. Delaware,* 438 U.S. 154, 169 (1978). However, defendant's case falls within a different category

than the normal search, as formal proceedings have already been initiated against him. Second, there is no chance that the evidence can be removed or destroyed, as defendant is in custody. Finally, an adversary hearing should be required before the warrant is issued because of the nature of the search and the type of intrusion the defendant is facing. *Schmerber v. California,* 384 U.S. 757, 768 (1966); *United States v. Crowder,* 543 F.2d 312, 316 (1975), *cert. denied,* 429 U.S. 1062 (1977).

Had defense counsel been present at the search warrant proceeding, he might have pointed out to the court exactly what the appropriate test would be for gonorrhea, so that the court would have been in a position of specifying what test should be done. Alternatively, had counsel been present at the jail when the warrant was executed, then he could have objected to the procedure that was actually done, been in a position to know that the test was the wrong one, and either challenge the execution of the warrant or conduct independent tests.

Defendant is mindful of the fact that no objection was made either to the *ex parte proceeding* or to the absence of counsel's presence at the jail, but submits that because the error affects the integrity of the factfinding process, this court must review it as plain error. Sec. 901.03(4), Stats. *See also State v. Gustafson,* 119 Wis. 2d 676, 693, — N.W.2d — (1984); and *State v. Baldwin,* 101 Wis. 2d 441, 446, 304 N.W.2d 742 (1981). Thus, defendant submits that a new trial be ordered in this action as to each count.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION.

C.D. had gonorrhea. The test given to defendant, while inconclusive, was negative for gonorrhea. Thus, if defendant did not have the disease, as the test results indicate, then C.D. had a motive for falsifying her testimony.

The only corroboration for the assault, the broken glasses and the cigarette package, could have easily been manufactured by C.D. in an attempt to explain her disease. The semen found on her underpants cannot be tied to him, and there was no way to tell the age of the stain. Thus, that evidence is not corroborative of the assault and abduction. Given Leo Draveling's opinion that he, C.D.'s fourth grade teacher and the superintendent of her school thought she was untruthful (17: 87, 90-93), defendant submits that this case falls within the rule of *Syvock v. State*, 61 Wis. 2d 411, 414-416, 213 N.W.2d 11 (1973). Accordingly, defendant submits that the evidence is insufficient to support a conviction in this action.

IV. THE SENTENCE IN THIS ACTION IS EXCESSIVE.

Defendant recognizes that ordinarily appellate courts will not interfere with the sentencing discretion of the trial court. *Ocanas v. State*, 70 Wis. 2d 179, 233 N.W.2d 457 (1975). Nevertheless, defendant submits that even if this court affirms the convictions in this case, the abduction and the sexual assault arose out of the same set of facts and same incident, so that concurrent sentences are warranted. Thus, this court should modify the two six year sentences to concurrent terms.

CONCLUSION

In light of the foregoing, defendant respectfully requests that this court reverse the judgment of the trial court and order a new trial as to each count. Alternatively, defendant requests that his sentences be modified to concurrent terms.

In addition, defendant respectfully requests that this court determine the constitutionality of Rule 809.32(1) and the scope of his attorney's representation under that rule.

Finally, this attorney respectfully requests permission to withdraw as counsel.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

230 West Wells Street, Room 500
Milwaukee, Wisconsin 53203

Attorney for Defendant-Appellant

COURT OF APPEALS
Of Wisconsin
State Capitol
P.O. Box 1688
Madison, Wisconsin 53701-1688
Telephone (608) 266-1880

Marilyn L. Graves
Clerk

October 22, 1984

Ellis T. McCoy
P.O. Box 147
Fox Lake, WI 53933

RE: #84-929-CR-NM State v. Ellis T. McCoy
(T.C. #K-3561)

Dear Mr. McCoy:

I have received from your appointed counsel a report that further appellate proceedings in your case would be frivolous and without any arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967). A copy of that report was served on you. In accordance with Rule 809.32(1) you have 30 days from the service of that report to file any response you may wish the court to consider.

Upon receipt of the response, we will transmit to the court the trial court record, the no merit brief and any response you have filed. The court will consider all issues raised by the report and your response. You will be promptly notified of any action taken in this matter.

Yours very truly,

/s/ Marilyn L. Graves
Clerk of Court of Appeals

cc: Louis B. Butler, Jr.
Kirbie Knutson
Enclosure (Rule 809.32)

DISTRICT I

Office of the Clerk
COURT OF APPEALS
Of Wisconsin

(Title omitted in printing)

84-929-NM

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

Ellis McCoy was found guilty of one count of second-degree sexual assault and one count of abduction. Assistent State Public Defender Louis Butler was appointed to represent McCoy on appeal. Butler filed a notice of appeal on McCoy's behalf but subsequently concluded that there was no merit to the appeal.

Rule 809.32(1), Stats., provides that:

> If an attorney appointed under s. 967.06(3) or Rule 809.30 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967), the attorney shall file with the court of appeals three copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

Butler has now filed his brief in this matter. The brief suggests four issues which might arguably support the appeal but does not indicate why those issues lack merit. Accordingly, the brief is not in compliance with Rule 809.32(1), Stats.

Upon the foregoing reasons,

IT IS ORDERED that the brief previously filed in this matter is struck. Assistant State Public Defender Louis Butler is directed to file a brief in compliance with Rule 809.31(1), Stats., within fifteen days of the date of this order.

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF WISCONSIN
IN SUPREME COURT
CASE NO. .....

STATE OF WISCONSIN EX REL.
ELLIS T. MCOY,

Relator,

v.

From: Appeal No. 84-929-CR-NM
Trial No. K-3561

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Respondent.

PETITION FOR SUPERVISORY WRIT OF PROHIBITION AND DECLARATION OF RELATOR'S RIGHTS

The petition of Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, pursuant to Rule 809.71, Stats., hereby petitions this court for a supervisory writ of prohibition prohibiting the court of appeals from striking the brief previously filed and prohibiting the court of appeals from ordering counsel to provide reasons why the issues presented in that brief lack merit, and petitions this court, pursuant to Rule 809.70, Stats., to determine the constitutionality of Rule 809.32(1) and whether the rule violates relator's sixth amendment right to counsel, on the following grounds:

1. The petitioner, Louis B. Butler, Jr., represents the relator, in the case of *State of Wisconsin v. Ellis T. McCoy, Case No.* 84-929-CR-NM, now pending in the court of appeals, District I.

2. Relator moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

3. The court of appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." See September 7, 1984 order, p. 2 (attached).

4. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with *Anders v. California,* 386 U.S. 738 (1967) and the subsequent decision of *Evitts v. Lucey,* 469 U.S. —, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

5. The court of appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included. The court also ordered that petitioner file a new brief within 15 days of the date of that order which is in compliance with the Rule.

6. The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accom-

panied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

7. The Wisconsin Supreme Court, consistent with *Anders,* has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State,* 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). This Court has not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

8. The United States Supreme Court very recently has reaffirmed its prior holding in *Anders,* stating that the attorney " . . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey,* 83 L.Ed.2d at 828.

9. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders,* the attorney shall

file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

10. Petitioner and relator submit that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on relator's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of *Anders* and *Lucey* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, petitioner and realtor submit that a discussion of why any issue lacks merit violates the sixth amendment.

11. Because petitioner believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, petitioner cannot ethically take a position which would argue against his client or act as a friend of the court. This Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). This Court has also determined that an advocate may urge any permissible construction of the law favorable to his or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

12. An order by this Court prohibiting the court of appeals from striking the brief previously filed and from

ordering counsel to provide reasons why the issues lack merit is necessary in order to protect relator's sixth amendment right to counsel. It would resolve the conflict that exists with the Wisconsin Rule and United State Supreme Court decisions.

13. An order by this Court as stated in para. 12 is necessary to prevent petitioner from violating this Court's ethical rules.

14. Petitioner would note that the No Merit procedure for petitions for review is substantially different from that for appeals, and that this Court does not require an attorney to provide reasons why a petition for review lacks merit. *Compare* 809.32(1) and (4).

15. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by *Anders* and *Lucey*.

16. A declaration of relator's sixth amendment right to counsel and whether Rule 809.32(1) violated that right is necessary before any new brief is written to prevent petitioner from violating relator's sixth amendment right to counsel.

17. Petitioner and relator currently have no other adequate remedy at law, other than this petition, to protect relator's rights and prevent petitioner from violating his ethical duty.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, prohibit the court of appeals from striking the brief already filed, and prohibit the court

of appeals from requiring petitioner to provide reasons why relator's appeal lacks merit.

Dated this 23rd day of April, 1985.

Respectfully submitted,

/s/ Louis B. Butler, Jr.
Assistant State Public Defender

819 North Sixth St., Room 821
Milwaukee, Wisconsin 53203

/s/ Eric Schulenberg
Chief, Appellate Division

340 W. Washington Ave.
P.O. Box 7862
Madison, Wisconsin 53707

OFFICE OF THE CLERK
SUPREME COURT
STATE OF WISCONSIN

Madison, May 8, 1985

(Title omitted in printing)

Order

Case No. 85-07181-W

On April 24, 1985 Assistant State Public Defender Louis B. Butler, Jr., filed a petition for a supervisory writ to prohibit the Court of Appeals, District I, from striking the brief he filed in an appeal pending in that court and prohibiting it from ordering him to provide reasons why the issues presented in that brief lack merit. The petition also asks this court, pursuant to sec. (Rule) 809.70, Stats., to determine the constitutionality of sec. (Rule) 809.32(1), Stats.

In the pending appeal, the petitioner moved the Court of Appeals for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats., and the Court of Appeals denied that motion by order of September 7, 1984, on the ground that, because a no merit report had not been filed, "no justiciable controversy exists involving the constitutionality issue. The constitutionality issue therefore cannot properly be addressed by this court at this time." From this it appears that the petitioner is not entitled to a supervisory writ and declaratory relief from this court for the reason that he has an adequate remedy in the Court of Appeals by renewing his motion for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats.

IT IS ORDERED, pursuant to sec. (Rule) 809.71, Stats., that the petition for supervisory writ and declaratory relief is denied.

Shirley S. Abrahamson, J., dissents.

MARILYN L. GRAVES
Clerk of Supreme Court

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 84-929-CR-NM

ELLIS T. McCOY,

Defendant-Appellant.

MOTION TO DETERMINE CONSTITUTIONALITY OF RULE 809.32(1) AND TO CLARIFY SCOPE OF ATTORNEY'S REPRESENTATION ON APPEAL

NOW COMES the above-named defendant, Ellis T. McCoy by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, and hereby moves this court for an order determining the constitutionality of Rule 809.32(1) and to clarify the scope of this attorney's representation, pursuant to Rule 809.14 and the order of the Wisconsin Supreme Court in *State ex rel. McCoy v. Court of Appeals, District I*, No. 85-0781-W, on the following grounds:

1. Defendant moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

2. The Court of Appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." *See* September 7, 1984 order, p. 2 (attached).

3. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with *Anders v. California,* 386 U.S. 738 (1967) and the subsequent decision of *Evitts v. Lucey,* 469 U.S. —, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

4. The Court of Appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included. The court also ordered that defendant file a new brief within 15 days of the date of that order which is in compliance with the Rule (attached).

5. Defendant filed a petition for supervisory writ of prohibition and declaration of relator's rights in the Wisconsin Supreme Court in *State ex rel. McCoy v. Wisconsin Court of Appeals, District I,* No. 85-0781-W, dated April 23, 1985.

6. The Wisconsin Supreme Court denied that petition on May 8, 1985, ruling that petitioner had an adequate remedy at law by renewing the motion for a determination of the constitutionality of the Rule in the Court of Appeals (attached).

7. The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request

permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

8. The Wisconsin Supreme Court, consistent with *Anders,* has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State,* 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). The appellate courts of this state have not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

9. The United States Supreme Court very recently has reaffirmed its prior holding in *Anders,* stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey,* 83 L.Ed.2d at 828.

10. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders*, the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

11. Defendant submits that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on his sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of *Anders* and *Lucey* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant submits that a discussion of why any issue lacks merit violates the sixth amendment.

12. Because counsel believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, counsel cannot ethically take a position which would argue against his client or act as a friend of the court. The Wisconsin Supreme Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). The Court has also determined that an advocate may urge any permissible construction of the law favorable to his

or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

13. An order by this Court determining the constitutionality of the no merit rule is necessary in order to protect defendant's sixth amendment right to counsel. It would resolve the conflict that exists with the Wisconsin Rule and United State (sic) Supreme Court decisions.

14. An order by this Court as stated in para. 13 is necessary to prevent petitioner from violating the Supreme Court's ethical rules.

15. Petitioner would note that the no merit procedure for petitions for review is substantially different than that for appeals, and that the Supreme Court does not require an attorney to provide reasons why a petition for review lacks merit. *Compare* 809.32(1) and (4).

16. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by *Anders* and *Lucey*.

17. A determination of the no merit rule, defendant's right to counsel and whether Rule 809.32(1) violates that right is necessary before any new brief is written to prevent petitioner from violating defendant's sixth amendment right to counsel.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of Rule 809.32(1) which requires that the attorney provide reasons why the issue

lacks merit as unconstitutional, and accept the brief that has already been filed in this action.

Dated this 4th da - of June, 1985.

Respectfully submitted,

/s/ LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth Street, Room 821
Milwaukee, Wisconsin 53203

/s/ ERIC SCHULENBERG
Chief, Appellate Division

340 West Washington Avenue
P. O. Box 7862
Madison, Wisconsin 53707-7862

Attorneys for Defendant-Appellant.

DISTRICT I

Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Amended January 16, 1986
Madison, January 15, 1986

(Title omitted in printing)

ORDER

84-929-CR-NM

Before Moser, P.J., Wedemeyer and Sullivan, JJ.

Ellis T. McCoy (McCoy) has renewed his motion for an order determining the constitutionality of Rule 809.32 (1), Stats., and to clarify the scope of his counsel's representation pursuant to Rule 809.14, Stats., and order of the Wisconsin Supreme Court in *State ex rel. McCoy v. Court of Appeals, District I*, No. 85-0781-W. The procedural facts of the case follow.

On August 14, 1984, McCoy moved for determination of the constitutionality of Rule 809.32(1), Stats., before this court. The court denied the motion on September 7, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." Subsequently, McCoy filed a no merit brief which was not in compliance with Rule 809.32(1), Stats. The court, in an order dated April 16, 1985, ordered that the no merit brief previously filed be struck for noncompliance with Rule 809.32(1), Stats. The court of appeals ordered McCoy to file a new brief in compliance with Rule 809.32(1), Stats., within fifteen days of the date of the order.

The defendant then filed a petition for a supervisory writ of prohibition and declaration of his rights in the Wisconsin Supreme Court in *Wisconsin ex rel. McCoy v. Wisconsin Court of Appeals, District I,* No. 85-0781-W. The supreme court denied the petition on May 8, 1985. It ruled that McCoy had an adequate remedy at law by renewing his motion for determination of the constitutionality of Rule 809.32(1), Stats., in the court of appeals. In accordance with that direction from the supreme court, McCoy has filed the present motion again requesting our determination of the constitutionality of Rule 809.32(1), Stats.

The court of appeals has no power to pass upon the questions posed by McCoy. Rule 809.32(1), Stats., is a rule prescribed by the supreme court for the regulation of the practice of the court of appeals. Such a procedural rule is binding upon this court until altered by the supreme court or the legislature. *Mosing v. Hagen,* 33 Wis. 2d 636, 646-47, 148 N.W.2d 93, 99 (1967). Viewing McCoy's motion in this light, we conclude that any determination by this court of the constitutionality of Rule 809.32(1), Stats., would be advisory in nature. Courts of law do not render advisory opinions. *Smith v. Pershing,* 10 Wis. 2d 352, 357, 102 N.W.2d 765, 768 (1960). The constitutionality of sec. 809.32(1), Stats., must be determined by its supreme court authors and not by a court bound to obey what that court creates.

Upon the foregoing reasons,

IT IS ORDERED that McCoy's motion requesting that we determine the constitutionality of Rule 809.32(1), Stats., and to clarify the scope of representation is denied. Louis Butler, assistant public defender, is further directed to file a brief in compliance with Rule 809.32(1) within fifteen days of the date of this order.

Marilyn L. Graves
Clerk of Court of Appeals

BEST AVAILABLE COPY

STATE OF WISCONSIN
IN SUPREME COURT

Case No. ————————

STATE OF WISCONSIN EX REL.
ELLIS T. McCOY,

Relator,

v.

From: Appeal No. 84-929-CR-NM
Trial No. K-3561

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Respondent.

PETITION FOR SUPERVISORY WRIT OF PROHIBITION AND DECLARATION OF RELATOR'S RIGHTS

The petition on behalf of Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, pursuant to Rule 809.71, Stats., hereby petitions this court for a supervisory writ of prohibition prohibiting the court of appeals from striking the brief previously filed and prohibiting the court of appeals from ordering counsel to provide reasons why the issues presented in that brief lack merit, in compliance with Rule 809.32(1), and petitions this court, pursuant to Rule 809.70, Stats., to determine the constitutionality of Rule 809.32(1) and whether the rule violates relator's sixth amendment right to counsel, on the following grounds:

1. The petitioner, Louis B. Butler, Jr., represents the relator, in the case of *State of Wisconsin v. Ellis T. McCoy,* Case No. 84-929-CR-NM, now pending in the court of appeals, District I.

2. Relator moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

3. The court of appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." See September 7, 1984 order, p. 2 (attached).

4. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with *Anders v. California,* 386 U.S. 738 (1967) and the subsequent decision of *Evitts v. Lucey,* 469 U.S. —, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

5. The court of appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included. The court also ordered that petitioner file a new brief within 15 days of the date of that order which is in compliance with the Rule.

6. The Wisconsin Supreme Court, in an order dated May 8, 1985 ruled that petitioner was not entitled to a supervisory writ and declaratory relief from that court for the reason "that he has an adequate remedy in the

Court of Appeals by renewing his motion for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats." See order in No. 85-0781-W, attached.

7. Petitioner renewed his "Motion to Determine Constitutionality of Rule 809.32(1) and to clarify scope of Attorney's Representation on Appeal" in the Court of Appeals in a motion dated June 4, 1985 (attached).

8. The Court of Appeals denied petioner's (sic) motion in an order dated January 15, 1986 and amended January 16, 1986, stating that the "constitutionality of sec. 809.32(1), Stats., must be determined by its Supreme Court authors and not by a court bound to obey what that court creates." See order, attached.

9. The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the

defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

10. The Wisconsin Supreme Court, consistent with *Anders,* has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State,* 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). This Court has not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

11. The United States Supreme Court very recently has reaffirmed its prior holding in *Anders,* stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey,* 83 L. Ed. 2d at 828.

12. The United States Court of Appeals recently held that "(i)f the *Anders* procedure is to work, therefore, the lawyer filing the *Anders* brief must, to the extent possible, remain in his role as advocate; at this stage of proceeding it is not for the lawyer to act as an unbiased judge of the merit of particular grounds for appeal. He or she is required to set out *any* irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court,

be arguably meritorious. This is done in order that those potential claims not be overlooked. The objective of these potential claims is for the court's determination, not the advocates." *United States v. Blackwell,* 767 F.2d 1486, 1487-88 (11th Cir. 1985).

13. At least one State Supreme Court has determined that it will no longer accept *Anders* motions, implying that frivolous briefs would be preferable. *Huguley v. State,* 253 Ga. 709, 324 S.E. 2d 729 (1985). *But see* Rule 809.25(3).

14. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders,* the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

15. Petitioner and relator submit that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on relator's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of *Anders* and *Lucey* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, petitioner and relator submit that a discussion of why any issue lacks merit violates the sixth amendment.

16. Because petitioner believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, petitioner cannot ethically take a position which would argue against his client or act as a friend of the court. This Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). This Court has also determined that an advocate may urge any permissible construction of the law favorable to his or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

17. An order by this Court prohibiting the court of appeals from striking the brief previously filed and from ordering counsel to provide reasons why the issues lack merit is necessary in order to protect relator's sixth amendment right to counsel. It would resolve the conflict that exists between the Wisconsin Rule and United State (sic) Supreme Court decisions.

18. An order by this Court as stated in para. 17 is necessary to prevent petitioner from violating this Court's ethical rules.

19. Petitioner would note that the No Merit procedure for petitions for review is substantially different than that for appeals, and that this Court does not require an attorney to provide reasons why a petition for review lacks merit. *Compare* 809.32(1) and (4).

20. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by *Anders* and *Lucey.*

21. A declaration of relator's sixth amendment right to counsel and whether Rule 809.32(1) violated that right is necessary before any new brief is written to prevent petitioner from violating relator's sixth amendment right to counsel.

22. Petitioner and relator currently have no other adequate remedy at law, other than this petition, to protect relator's rights and prevent petitioner from violating his ethical duty.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, prohibit the court of appeals from striking the brief already filed, and prohibit the court of appeals from requiring petitioner to provide reasons why relator's appeal lacks merit in compliance with Rule 809.32(1).

Dated this 21st day of January, 1986.

Respectfully submitted,

/s/ Louis B. Butler, Jr.
LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth St., Room 821
Milwaukee, Wisconsin 53203

ERIC SCHULENBERG
Chief, Appellate Division

P.O. Box 7923
Madison, Wisconsin 53707

cc: Ellis T. McCoy
Box 147
Fox Lake, WI 53933

James McDermitt
Assistant Attorney General

Hon. Ted E. Wedemeyer
Court of Appeals, District I

Hon. William R. Moser
Court of Appeals, District I

Hon. Michael T. Sullivan
Court of Appeals, District I

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 86-0172-W

(Title omitted in printing)

RESPONSE TO PETITION FOR SUPERVISORY WRIT OF PROHIBITION AND DECLARATION OF RELATOR'S RIGHTS; AND SUPPORTING MEMORANDUM

BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

JAMES H. McDERMOTT
Assistant Attorney General

Attorneys for Respondent

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859

TABLE OF CONTENTS

Page

Preface 1

RESPONSE 2

SUPPORTING MEMORANDUM 3

I. THE PETITION, INSOFAR AS IT CONSTITUTES A REQUEST FOR LEAVE TO COMMENCE AN ORIGINAL ACTION PURSUANT TO SEC. (RULE) 809.70, STATS., SHOULD BE GRANTED, BECAUSE NO LOWER COURT OF THIS STATE, TRIAL OR APPELLATE, HAS POWER TO GRANT THE QUINTESSENTIAL AND BASIC RELIEF SOUGHT HEREIN, IN A MATTER *PUBLICI JURIS*, NAMELY, THE PASSING OF ADVERSE JUDGMENT ON THE CONSTITUTIONALITY OF A RULE OF THIS COURT, SUCH AS THAT HERE INVOLVED 3

II. THE PETITION, INSOFAR AS IT CONSTITUTES A REQUEST FOR LEAVE TO COMMENCE AN ORIGINAL ACTION, PURSUANT TO SEC. (RULE) 809.70, STATS., SHOULD BE GRANTED EVEN WERE THIS NOT A MATTER *PUBLICI JURIS*, BECAUSE NO LOWER COURT OF THIS STATE, AS ABOVE SHOWN, HAS POWER TO GRANT THE QUINTESSENTIAL AND BASIC RELIEF SOUGHT BY RELATOR HEREIN, WERE HE ENTITLED TO IT; AND FOR THIS COURT TO REFUSE TO INVOKE ITS ORIGINAL JURISDICTION HEREIN WOULD THEREFORE DENY RELATOR ACCESS TO ANY REMEDY FOR HIS ALLEGED WRONG, IN VIOLATION OF ART. I, SEC. 9, WISCONSIN CONSTITUTION 16

III. THE PETITION, INSOFAR AS IT CONSTITUTES A REQUEST FOR LEAVE TO COMMENCE AN ORIGINAL ACTION, PURSU-

Page

ANT TO SEC. (RULE) 809.70, STATS., SHOULD BE GRANTED, IF ONLY FOR THE REASON THAT IT PRESENTS A UNIQUE ISSUE OF INTEREST TO THIS STATE AND ITS CITIZENS, WHICH MERITS IMMEDIATE CONSIDERATION BY THIS COURT 17

IV. THE PETITION, INSOFAR AS IT SEEKS, IN THE LANGUAGE OF THIS COURT, "A DECLARATORY JUDGMENT THAT SEC. (RULE) 809.32(1), STATS., TO THE EXTENT THAT IT REQUIRES AN ATTORNEY APPOINTED TO REPRESENT A CRIMINAL DEFENDANT IN AN APPEAL TO DISCUSS IN A NO MERIT BRIEF WHY THE ISSUES THAT MIGHT ARGUABLY SUPPORT THE APPEAL LACK MERIT, IS UNCONSTITUTIONAL," SHOULD BE DENIED, BECAUSE THE PORTION OF SEC. (RULE) 809.32(1), STATS., CHALLENGED AS DENYING RELATOR'S SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION OF COUNSEL DOES NOT DENY SUCH RIGHT, AND INDEED PROTECTS AND PROMOTES IT, FOR REASONS DISCUSSED BELOW 19

V. THE PETITION, INSOFAR AS IT SEEKS, IN THE LANGUAGE OF THIS COURT, "A DECLARATORY JUDGMENT THAT SEC. (RULE) 809.32(1), STATS., TO THE EXTENT THAT IT REQUIRES AN ATTORNEY APPOINTED TO REPRESENT A CRIMINAL DEFENDANT IN AN APPEAL TO DISCUSS IN A NO-MERIT BRIEF WHY THE ISSUES THAT MIGHT ARGUABLY SUPPORT THE APPEAL LACK MERIT, IS UNCONSTITUTIONAL" SHOULD BE DENIED BECAUSE A PRESUMPTION OF CONSTITUTIONALITY IS OPERATIVE AS TO THE PORTION

Page

OF SEC. (RULE) 809.32(1) HEREIN CHALLENGED; SUCH PRESUMPTION DERIVES ADDED STRENGTH FROM THE NATURE OF THE CREATOR OF SUCH RULE, AND THE AWARENESS OF *ANDERS* EXPRESSED THEREIN; AND SUCH STRENGTHENED PRESUMPTION MILITATES AGAINST THE GRANTING OF THE PETITION, IN ITS ASPECT ABOVE MENTIONED 56

VI. THE PETITION, INSOFAR AS IT SEEKS, IN THE LANGUAGE OF THIS COURT, "A SUPERVISORY WRIT TO PROHIBIT THE COURT OF APPEALS FROM STRIKING THE NO MERIT BRIEF PREVIOUSLY FILED IN THE APPEAL AND ORDERING COUNSEL FOR THE DEFENDANT TO PROVIDE REASONS WHY THE ISSUES PRESENTED IN THAT BRIEF LACK MERIT" SHOULD BE DENIED, NOT ONLY BECAUSE THE BRIEF FILED BY RELATOR IN THE COURT OF APPEALS FAILS TO MEET THE VALID REQUIREMENT OF THE CHALLENGED PORTION OF SEC. (RULE) 809.32(1), STATS., BUT ALSO BECAUSE SUCH BRIEF VIOLATES SUCH RULE IN THAT, IN A MANNER PATENTLY INCONSISTENT WITH ITS REPRESENTATION THAT AN APPEAL WOULD BE FRIVOLOUS, IT PRESENTS ARGUMENTS IN BEHALF OF THE RELATOR PRECISELY AS THEY WOULD BE PRESENTED IN THE ORDINARY, INITIAL BRIEF OF A DEFENDANT-APPELLANT ON A CRIMINAL APPEAL, WITH THEIR PRESENTATION OF SUCH ARGUMENTS IN CLEAR CONFLICT WITH BOTH *ANDERS* AND SEC. (RULE) 809.32(1), STATS. 58

CONCLUSION 60

Preface

This response to the above-described petition of the relator (hereinafter "the Petition"), and its supporting memorandum, are filed pursuant to an order of this Court, entered herein on February 21, 1986.

Such order has viewed the Petition, insofar as it seeks a declaratory judgment described in such order, as constituting "a request for leave to commence an original action, pursuant to sec. (Rule) 809.70, Stats."; and therefore the response hereinafter set forth, and its supporting memorandum, appropriately first address whether this Court should grant the Petition, insofar as it constitutes a request for leave to commence an original action in this Court, pursuant to sec. (Rule) 809.70, Stats.

RESPONSE

NOW COMES the respondent above-named, by Bronson C. La Follette, Attorney General, State of Wisconsin, and James H. McDermott, Assistant Attorney General, its attorneys, and, as a response to the Petition herein, respectfully submits to this Court as follows:

(1) That insofar as the Petition herein constitutes, in the view of this Court, a request for leave to commence an original action, pursuant to sec. (Rule) 809.70, Stats., it should be granted, for the reasons shown in Arguments I, II and III, presented in the Supporting Memorandum, *infra,* which arguments are incorporated herein by reference.

(2) That the Petition, insofar as it seeks, in the language of this Court: "a declaratory judgment that sec. (Rule) 809.32(1), Stats., to the extent that it requires an

attorney appointed to represent a criminal defendant in an appeal to discuss in a no merit brief why the issues that might arguably support the appeal lack merit, is unconstitutional" should be denied, for reasons set forth in Arguments IV and V of said Supporting Memorandum, which arguments are incorporated herein by reference.

(3) That the Petition, insofar as it seeks, in the language of this Court, "a supervisory writ to prohibit the Court of Appeals from striking the no merit brief previously filed in the appeal and ordering counsel for the defendant to provide reasons why the issues presented in the brief lacked merit" should be denied, for reasons shown in Argument VI of said Supporting Memorandum, which argument is incorporated herein by reference.

SUPPORTING MEMORANDUM

I. THE PETITION, INSOFAR AS IT CONSTITUTES A REQUEST FOR LEAVE TO COMMENCE AN ORIGINAL ACTION PURSUANT TO SEC. (RULE) 809.70, STATS., SHOULD BE GRANTED, BECAUSE NO LOWER COURT OF THIS STATE, TRIAL OR APPELLATE, HAS POWER TO GRANT THE QUINTESSENTIAL AND BASIC RELIEF SOUGHT HEREIN, IN A MATTER *PUBLICI JURIS,* NAMELY, THE PASSING OF ADVERSE JUDGMENT ON THE CONSTITUTIONALITY OF A RULE OF THIS COURT, SUCH AS THAT HERE INVOLVED.

In the *Income Tax Cases,* 148 Wis. 456, 498, 134 N.W. 673, 135 N.W. 164 (1912), the Court said in pertinent part:

> . . . the original jurisdiction of this court may be rightly invoked when there is a showing made . . . that . . . (8) the situation is such, in a matter *publici juris,*

> that the remedy in the lower courts is entirely lacking . . . , and hence jurisdiction must be taken or justice will be denied . . . . Cases falling within these general classes have been hld to be properly within the original jurisdiction.

There can be no doubt, respondent submits, that the matter here involved is "*publici juris.*" In *State ex rel. Reynolds v. Appleton,* 197 Wis. 442, 444, 222 N.W. 244 (1928), this Court observed that " . . . To challenge an order of the railroad commission, lawfully made, is to challenge the authority of the state itself, and it therefore becomes a matter of state-wide concern and *publici juris.*" Here, the challenge is to a rule of this Court, lawfully made; and it also is obviously a challenge to the authority of the state itself, which "therefore becomes a matter of state-wide concern and *publici juris.*" It follows, this matter clearing being one "*publici juris,*" that under the above-quoted portion of the *Income Tax Cases,* this Court must take jurisdiction herein, or justice will be denied because the declaratory judgment remedy sought by relator herein, which must be granted to him, if warranted, before the writ of prohibition it seeks could issue, is plainly "entirely lacking" in "the lower courts", *i.e.,* in any state lower court, trial or appellate.

The declaratory judgment remedy which relator seeks herein clearly entails a passing of judgment on the constitutionality of a portion of a rule of this Court, namely, sec. (Rule) 809.32(1), Stats., a declaration that such portion is unconstitutional, and a striking of such portion by the court so declaring. *See* Petition, pp. 1, 2, unnumbered first paragraph; Par. 17, Petition, p. 7; and what might be

termed the "prayer" of the Petition, at p. 8, wherein the relator, described as "petitioner" requests, *inter alia,* "that this Court strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, ..."

The State respectfully submits that, on the basis of authorities discussed *infra,* no lower court of the State of Wisconsin, trial or appellate, possesses the power to strike a rule of pleading, practice, or procedure promulgated by its supervising court, the Supreme Court of Wisconsin, or any portion of such a rule. And the State further submits that, on the same basis, it is beyond the power of any such lower court to make a "determination" that such a rule, or any portion thereof, violates the Sixth Amendment right to effective representation of counsel, and to then and therefore order it stricken. As will now be shown, if there is to be any voiding or striking of the portion of Rule 809.32(1)[1] here in question, namely, the words "and a discussion of why the issue lacks merit," appearing in its first sentence, it must occur either through action of the Supreme Court of Wisconsin, or of its Legislature, and

---

1 Such rule, as of July, 1985, reads:

> "If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders v. California,* 386 U.S. 783 (1967), the attorney shall file *with the Court of Appeals,* 3 copies of a brief in which is stated *anything in the record that might arguably support the appeal and a discussion why the issue lacks merit.* The attorney shall serve a copy of the brief on the defendant, and shall file a copy in the Court of Appeals that service has been made upon the defendant. The defendant may file a response to the brief within 30 days of service." (Emphasis supplied.)

cannot come about as a result of a lower state court passing adverse constitutional judgment on such rule portion.

That this is so is established by explicit declarations of this Court, grounded on statutory provisions relative to its rule-making powers.

The first of such declarations is found in *Attorney General ex rel. Cushing v. Lum* [hereinafter "Lum"], 2 Wis. 371 (*507), 374 (*510) (1853), in the statement therein that, " . . . The rules prescribed by this court for the regulation of its own practice, *as well as for that of the Circuit Court,* are the law of the land, and are binding upon *all courts,* officers and parties, *until altered by this court or the legislature.* R. S., p. 409 . . . . " (Emphasis supplied.) And this statement was simply a recognition of what statutory law provided, as evidenced by sec. 1 of Title XXII of the Revised Statutes of Wisconsin, 1849, appearing at p. 409 thereof, and reading:

> The several judges of the supreme court shall, and they are hereby required, to meet at the supreme court room, in Madison, on the second Tuesday of June, A.D. one thousand eight hundred and forty-nine, and hold a term of the supreme court *for the purpose of preparing and promulgating a code of rules of practice for the different courts of the state,* and also to dispose of any other business that may be on the calendar for their disposition, as at any other term; and all rules adopted and published by the supreme court, shall be taken and construed to have the same binding force and effect that is given to a law, *until the said rule shall be amended or altered by the supreme court or the legislature.* (Emphasis supplied.)

A modern case, *Mosing v. Hagen* [hereinafter "*Mosing*"], 33 Wis. 2d 636, 646, 647, 148 N.W.2d 93 (1967),

shows that the law, as set forth in *Lum* and the 1849 statute therein mentioned, remains unchanged, despite differences between such 1849 statute and its successor statute in force in 1967, and still in force, albeit renumbered. *Mosing* so shows in its statement that, " . . . almost since statehood the court has recognized that its rules regulating practice before it and before the circuit courts are the law of the land and are binding upon *all courts,* officers and parties *until changed by the court or the legislature. Attorney General ex rel. Cushing v. Lum* (1853), 2 Wis. 371 (*507)." (Emphasis supplied.) The pertinent statute in effect in 1967 when this statement was made was sec. 251.18, Stats., 1963, quoted in full in *Mosing* (33 Wis. 2d at 644), and reading in pertinent part as follows:

> The state supreme court *shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts,* for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits . . . . *Nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice or procedure* . . . . (Emphasis supplied.)

It will be noted that while the 1849 statute above-quoted specifically provided that "all rules adopted and published by the supreme court, shall be taken and construed to have the same binding force and effect that is given to a law, *until the said rule shall be amended or altered by the supreme court or the legislature.*" (Emphasis supplied), such language does not appear in sec. 251.18, Stats. (1963). It is clear that the sec. 251.18, Stats., provision that, "nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or

rules relating to pleading, practice or procedure'' clearly established that the rules of the Supreme Court could be modified or repealed by the Legislature. There is, however, no language in sec. 251.18, Stats., as there was in its 1849 predecessor, expressly showing that one of the two exclusive means for modifying or repealing such rule was by action of the Supreme Court itself. Despite this difference in the statutes, however, the Supreme Court of 1967, well aware of the provisions of sec. 251.18, which is quoted in full in its *Mosing* opinion, and doubtless well aware, too, of *Lum's* reliance on the 1849 predecessor statute of sec. 251.18, showed no hesitancy or reluctance in referring with obvious approval to the long-standing recognition of the *Lum*-stated principle above-shown, with obvious approval of such principle as well, as a rule of law firmly imbedded in Wisconsin jurisprudence. It is submitted that this Court showed no hesitancy or reluctance in conferring such approvals in *Mosing* because it must have viewed the first sentence of sec. 251.18, Stats., with its provision for mandatory procedural rulemaking by the Supreme Court to ''regulate pleading, practice and procedure in judicial proceedings in all courts,'' when read in conjunction with the further provision of such statute that nothing therein ''shall abridge the right of the legislature to enact, modify or repeal . . . rules relating to pleading, practice or procedure,'' as clearly indicating that the province of procedural rule-making was one wherein no body or entity, such as, *e.g.*, a lower court, could intrude, such province being exclusively that of the Supreme Court or the Legislature. And since no decision of the Supreme Court of Wisconsin subsequent to *Mosing* has departed from the principle enunciated in *Lum*, as above shown, and approved in and by *Mosing*, as above shown, it is plain, the State submits,

that today, as in 1853 and and as in 1967, a procedural rule such as Rule 809.32, or any part thereof, cannot be ''changed,'' *i.e.*, stricken, voided, suspended, amended, or in any way modified, unless by action of the Supreme Court of Wisconsin, pursuant to the procedural requirements laid down in sec. 751.06, Stats., the current successor statute to sec. 251.18, Stats., 1963, or by action of the Legislature.

The case law and statutes of Wisconsin above-noted, insofar as they clearly show that rules of pleading, practice, or procedure (hereinafter ''procedural rules'') promulgated by the highest court of the state are not to be changed by a lower court, including a lower appellate court, are in accord with a general principle of law widely recognized in the United States. Such principle, and the uniform adherence accorded it in this country, were given joint and early recognition in *State v. Knight*, 152 P. 362, 363, 49 Okla. 202 (Sup. Ct. of Okla. 1915), when the Court said:

> . . . the effect of the [procedural] rules when adopted by an appellate court, that are prescribed to govern procedure in inferior courts, has frequently been passed upon by the courts, and invariably held to be binding, and the question does not seem to us to admit of any controversy or argument.
>
> The rule is stated thus in 6 Stand. Ency. Proc. p. 63:
>
> 'Rules have the force and effect of law, and are binding upon litigants, and upon counsel, upon the court and its officers. A rule made pursuant to statutory authority by an appellate court to govern the procedure in inferior courts is binding upon the latter, and rules adopted by a board or convention of judges are binding on the individual judges.'

And in the notes to this text are cited a great number of cases from many states in the Union. In fact we do not know of any case where an appellate court is given authority by statute to prescribe rules regulating procedure in inferior courts which holds that such rules are not binding, *or that the inferior court may disregard or set aside said rules.* The same rule is announced in 18 Ency. P. & P. p. 1271, as follows:

'Although courts may sometimes dispense with the requirements of their own rules, *it is uniformly held that they have no such power in regard to rules prescribed for them by a higher court.*'

We might cite case after case in support of this proposition, but deem it unnecessary. *It was clearly without the power and authority of the defendant, as the judge of the county court of Rogers county, to vacate or set aside the rules theretofore prescribed by the justices of this [supreme] court, and adopted by his predecessor,* . . . (Emphasis and bracketed material supplied.)

More recent cases have also followed the principle that procedural rules of a state's highest court are not to be amended, altered, or changed by any lower court. *See, e.g., In re Estate of Moore,* 291 N.E.2d 566, 568 (Ct. App. Indiana, 1973); *Ser-Nestler, Inc. v. General Finance Loan Company,* 167 So. 2d 230, 232 (Dist. Ct. of App. of Fla. 1964); *Pruitt v. Wood,* 156 S.E. 126, 127, 99 N.C. 788 (1930); *State v. Moore,* 187 S.E. 586, 587, 210 N.C. 459 (1936); and *State v. McCall,* Fla., 301 So. 2d 774, 775 (1974).

Clearly, then, the Wisconsin rule in question, which denies any lower state court the power to strike the portion of Rule 809.32(1) herein constitutionally challenged, and denies it the power to make the "determination" of

claimed constitutional invalidity of such rule sought by relator, finds impressive support in the decisions of other state courts. Moreover, it is clear that a counterpart of such rule is operative in the Federal judicial system. *See Sutton v. United States,* 267 F.2d 271, 273 (4th Cir. 1959), wherein the Court held that where a rule "was adopted by the Supreme Court [of the United States] in the exercise of its supervisory power over the federal judicial system, it is not within the province of an inferior court, even if it deemed it desirable, to extend the rule's operation beyond the areas in which it has been applied by the Supreme Court. [Authority omitted.]" (Bracketed material supplied.) This holding, it is submitted, is clear evidence that in the Federal judicial system, as in that of Wisconsin, a rule of the system's highest court cannot be changed by any lower court in such system.

It is also perhaps noteworthy that, consistent with the sound principle that a lower state court cannot change a *procedural* rule enunciated by the state's highest court, at least one appellate court has held that an appellate court cannot change a rule of adjudication announced by the state's highest court. *See Girvin v. Metropolitan Life Ins. Co.,* 84 S.W.2d 644, 645 (Springfield Court of Appeals, Missouri, 1935).

In making this particular argument, the respondent is well aware that it may seem anomalous that the Wisconsin Court of Appeals, and even a circuit court in Wisconsin, can pass judgment on the constitutionality of a

statute,[2] but is precluded from doing so with respect to a procedural rule of the Supreme Court. If such anomaly exists, however, it is plainly not something which, in and of itself, could be said to overturn, or capable of being used as the basis for overturning, the well-entrenched principle of Wisconsin law that a lower court cannot and shall not change, by striking, voiding, suspending, amending, or in any way modifying, a procedural rule of the State's highest court. And it is such rule, the respondent submits, which, in this matter *publici juris,* decrees that "the remedy in the lower courts is entirely lacking", so that this Court must take original jurisdiction herein, "or justice will be denied."

---

[2] As to the Circuit Court's power to rule on the constitutionality of a statute, see *Just v. Marinette County,* 56 Wis. 2d 7, 24-26, 201 N.W.2d 761 (1972). There is language in this case so broad that, *considered alone,* it might be thought of as authorizing a circut court to rule on *any* "constitutional issue," even one as to the constitutionality of a procedural rule of the Wisconsin Supreme Court, or some part thereof. Such language is, "We think that when a *constitutional issue* is now presented to the trial courts of this state, it is the better practice for those courts to recognize its importance, have the issue thoroughly briefed, and fully presented. *The issue* should be decided as any other important issue with due considerations. . . ." (Emphasis supplied; 56 Wis. 2d at 26.) Read, however, in the context of the *Just v. Marinette County* decision, and perhaps especially in the context of the paragraph wherein such broad language appears, and in the context of the two preceding paragraphs, it is plain, the State submits, that such broad language was not meant to, and does not, authorize a circuit court or any other lower court in the Wisconsin judicial system to adjudicate a constitutional challenge to a Supreme Court procedural rule.

II. THE PETITION, INSOFAR AS IT CONSTITUTES A REQUEST FOR LEAVE TO COMMENCE AN ORIGINAL ACTION, PURSUANT TO SEC. (RULE) 809.70, STATS., SHOULD BE GRANTED EVEN WERE THIS NOT A MATTER *PUBLICI JURIS,* BECAUSE NO LOWER COURT OF THIS STATE, AS ABOVE SHOWN, HAS POWER TO GRANT THE QUINTESSENTIAL AND BASIC RELIEF SOUGHT BY RELATOR HEREIN, WERE HE ENTITLED TO IT; AND FOR THIS COURT TO REFUSE TO INVOKE ITS ORIGINAL JURISDICTION HEREIN WOULD THEREFORE DENY RELATOR ACCESS TO ANY REMEDY FOR HIS ALLEGED WRONG, IN VIOLATION OF ART. I, SEC. 9, WISCONSIN CONSTITUTION.

As above shown, this is clearly a matter *publici juris;* but assuming, for purposes of this argument only, that it is not, the above-stated argument, requiring nothing by way of amplification, can be and hereby is made. In making such argument, however, involving the constitutional guaranty of Art. I, sec. 9, Wisconsin Constitution, that "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character . . .", respondent, lest such argument be misunderstood by relator as a concession by respondent that relator is entitled to victory on the merits herein, points out the following sapient observations made by the Court in *New York Life Ins. Co. v. State,* 192 Wis. 404, 412, 211 N.W. 288, 212 N.W. 801 (1927):

> . . . The guaranty of sec. 9, art. I, of the state constitution that "Every person is entitled to a certain remedy in the laws" does not mean a remedy that must be accompanied by a certainty of recovery. If it did, the losing party of every lawsuit would be denied rights guaranteed to him by this section of the constitution. *This provision does no more than to*

guarantee to every suitor his day in a court of competent jurisdiction to which he may present his claim for judicial relief and in which he may either win a victory or suffer a defeat according to the strength or weakness of the case which he presents. (Emphasis supplied.)

III. THE PETITION, INSOFAR AS IT CONSTITUTES A REQUEST FOR LEAVE TO COMMENCE AN ORIGINAL ACTION, PURSUANT TO SEC. (RULE) 809.70, STATS., SHOULD BE GRANTED, IF ONLY FOR THE REASON THAT IT PRESENTS A UNIQUE ISSUE OF INTEREST TO THIS STATE AND ITS CITIZENS, WHICH MERITS IMMEDIATE CONSIDERATION BY THIS COURT.

The above-stated argument requires little amplification except to note that it derives substantial support from the statement made in *State ex rel. Lynch v. Conta,* 71 Wis. 2d 662, 668, 239 N.W.2d 313 (1976), that, "This court has already decided the question of original jurisdiction. Unquestionably the guidelines acknowledged in *Petition of Heil* (1939), 230 Wis. 428, 442, 443, 284 N.W. 42, embrace this case, *with its unique issues of interest to this state and its citizens.*" (Emphasis supplied.) There can be no doubt of the uniqueness of the issue here presented, if only by reason of the fact that it appears to be the first constitutional challenge to sec. (Rule) 809.32(1), Stats., and the first challenge to the constitutionality of a procedural rule of this Court on a Sixth Amendment basis, and perhaps on any basis. It is certainly beyond dispute that such issue is of interest to the State of Wisconsin, since, under case law above-cited, it clearly involves a challenge to the authority of the state itself. Moreover, such issue is plainly of interest to the citizens of this

state, since it involves a claim of an alleged Sixth Amendment right of any citizen-defendant of this state whose attorney, appointed under sec. (Rule) 809.30, Stats., or under ch. 977, Stats., is, in the language of sec. (Rule) 809.32(1), Stats., "of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967), ..." While citizens falling into this category would clearly constitute only a small portion of Wisconsin's citizenry at any given time, the interest of every Wisconsin citizen is involved in such constitutional claim, since it is theoretically possible that *any* citizen of Wisconsin might someday find himself or herself in such category.

IV. THE PETITION, INSOFAR AS IT SEEKS, IN THE LANGUAGE OF THIS COURT, "A DECLARATORY JUDGMENT THAT SEC. (RULE) 809.32(1), STATS., TO THE EXTENT THAT IT REQUIRES AN ATTORNEY APPOINTED TO REPRESENT A CRIMINAL DEFENDANT IN AN APPEAL TO DISCUSS IN A NO MERIT BRIEF WHY THE ISSUES THAT MIGHT ARGUABLY SUPPORT THE APPEAL LACK MERIT, IS UNCONSTITUTIONAL," SHOULD BE DENIED, BECAUSE THE PORTION OF SEC. (RULE) 809.32(1), STATS., CHALLENGED AS DENYING RELATOR'S SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION OF COUNSEL DOES NOT DENY SUCH RIGHT, AND INDEED PROTECTS AND PROMOTES IT, FOR REASONS DISCUSSED BELOW.

Respondent submits that the portion of Rule 809.32(1) challenged herein not only does *not* deny defendant his

Sixth Amendment right to effective representation of counsel, but indeed protects and promotes such right.

In taking such position in this argument, respondent will first address relator's erroneous claim that Federal case law shows the rule portion in question to be an infringement on relator's "sixth amendment right to counsel," (Par. 15, Petition); will then discuss how and why such rule portion is in actuality protective and promotive of a defendant's right under the Sixth Amendment, United States Constitution, to effective representation of counsel; and will then discuss certain state court decisions supportive of the above-described position of respondent, and the sole Federal case, its rationale notably weak, which arguably is *contra* such position.

A.

The "attorney appointed under s. 809.30 or ch. 977," referred to in Rule 809.32(1), will hereinafter be called, for purposes of brevity, "defender."

The question addressed in this argument is this: Where a defender, pursuant to Rule 809.32(1), files with the Court of Appeals a "no merit" brief showing "anything in the record that might arguably support the appeal," does the requirement of s[illegible]ule that such brief contain "a discussion of why the issue lacks merit" compel action of the defender which constitutes a denial of defendant's Sixth Amendment right to effective assistance of counsel? Relator asserts the claim that Federal case law answers such question, "Yes." The respondent disagrees, for reasons now shown.

In asserting the above-mentioned claim, the Petition reads in pertinent part:

> 9. The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:
>
> 'This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.'
>
> . . .
>
> 11. The United States Supreme Court very recently has reaffirmed its prior holding in *Anders,* stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey,* 83 L. Ed.2d at 828.
>
> 12. The United States Court of Appeals recently held that "(i)f the *Anders* procedure is to work, there-

fore, the lawyer filing the *Anders* brief must, to the extent possible, remain in his role as advocate; at this stage of proceeding it is not for the lawyer to act as an unbiased judge of the merit of particular grounds for appeal. He or she is required to set out *any* irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious. This is done in order that those potential claims not be overlooked. The objective of these potential claims is for the court's determination, no' he advocates." *United States v. Blackwell,* 767 F. 1486, 1487-88 (11th Cir. 1985).

. . .

15. Petitioner and relator submit that the portion of sec. 809.32(1) which requires a discussion of any the appeal lacks merit would infringe on his sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of *Anders* and *Lucey* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant submits that a discussion of why any issue lacks merit violates the sixth amendment.

Before considering the language of *Anders v. California,* 386 U.S. 738 (1967) (hereinafter "*Anders*"), *Evitts v. Lucey,* 83 L. Ed. 2d 821, 469 U.S. — (1985) (hereinafter "*Evitts*"), and *United States v. Blackwell,* 767 F.2d 1486 (1985) (hereinafter "*Blackwell*"), giving rise to most of the above-quoted portions of the Petition, respondent di-

rects this Court's attention to what might be called the seminal case on the subject of withdrawal by a defender after trial, on the ground that appeal would be frivolous. Such case is *Ellis v. United States,* 356 U.S. 674 (1958) (hereinafter "*Ellis*"), and its key language is quoted in *Anders,* 386 U.S. at 741, 742. It reads:

> If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. *If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case,* then leave to withdraw may be allowed and leave to appeal may be denied. (Emphasis supplied).

This case law language, advisory in nature, raises some substantial questions of its own. How can a court, passing on a "no merit" brief, become "satisfied that counsel has diligently investigated the possible grounds of appeal?" Is such satisfaction attained by a defender doing nothing more than giving a bare-bones list of possible grounds for appeal, without analysis of such grounds to show their lack of merit? Should not the defender, for the benefit of the defendant as well as for the benefit of this court, not only list the possible grounds for appeal, if any, but then carefully spell out just why such grounds lack merit? *Ellis,* it is submitted, does not answer these questions, though it raises them. Nor are they answered, it is submitted, by *Anders, Evitts,* or *Blackwell.*

Turning now to *Anders,* respondent submits that only a misreading thereof will produce the conclusion arrived at by the relator that it condemns, as a denial of his constitutional right to effective representation of counsel, the rule

requirement here in question, namely, that the "no merit" brief show the meritless nature of any issue which might arguably support the appeal.

The key portions of *Anders,* it is submitted, are these:

> In petitioner's case, his appointed counsel wrote the District Court of Appeal, stating:
>
> 'I will not file a brief on appeal as I am of the opinion that there is not merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him. . . . [H]e wishes to file a brief in this matter on his behalf.'
>
> The District Court of Appeal, after having examined the record, affirmed the conviction. *We believe the counsel's bare conclusion, as evidenced by his letter, was not enough. . . .*
>
> . . .
>
> The constitutional requirement of substantial equality and fair process can only be attained *where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.* The no-merit letter and the procedure it triggers do not reach that dignity. *Counsel should, and can with honor and without conflict, be of more assistance to his client and the court.*[3] His role as advocate requires that he support his client's *appeal* to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, *after a consciententious* (sic) *examination of it,* he should so advise the court and request permission to withdraw. *That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.* A copy of counsel's brief should be furnished to indigent and time allowed him to raise any points that he chooses; court —not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (*and therefore not frivolous*) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

> This requirement *would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.* It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, *but also to the legal authorities as furnished it by counsel.* The no-merit letter, on the other hand, affords neither the client nor the court *any* aid. The former must shift entirely for himself while the court has only the cold record which it must review *without the help of an advocate.* Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but are able to afford the retention of private counsel. (Footnote omitted; emphasis supplied; 386 U.S. 742; 744, 745.)

It is clear that relator herein views parts of this language as, in effect, ruling that a no-merit brief shall not, if it refers to "anything in the record that might arguably support the appeal," take the further step of stating, *consistent with the defender's advice to the court in such brief that he has found defendant's case, in Anders language, to be "wholly frivolous,"* of advising the court *why the* "anything in the record that might arguably support the appeal" was meritless.

The respondent, responding to such view of the relator, first of all submits that nothing in the key langauge above-quoted from *Anders* can be viewed as a holding, express or implied, that condemns as unconstitutionally depriving a defendant of effective assistance of counsel the supplying, in a no-merit brief, of a reasoned explanation by the defender, consistent with his belief that an appeal would be frivolous, of why any matter of record that might arguably support the appeal is meritless. In this respect, it is of particular significance that Footnote 3 to the above-quoted *Anders* language, omitted above, states:

> For comparative purposes see *Tate v. United States,* 123 U.S. App. D.C. 261, 359 F.2d 245, and *Johnson v. United States,* 124 U.S. App. D.C. 29, 360 F.2d 844, which outline the practice followed in the District of Columbia. These guidelines are elaborated in more detaail in a 'Statement to be Handed by the Clerk to Appointed Counsel' which has been prepared by the Court of Appeals for the District of Columbia Circuit. *We indicate no approval of the requirements set out in the statement or in the cases.* (Emphasis supplied.)

Johnson v. United States, referred to in such footnote, shows that the District of Columbia "guidelines" referred to therein provide that a defender, desiring to withdraw because an appeal would be frivolous, was required to " . . . file a supporting memorandum *analyzing the case legally,* citing record references to the transcript of one is available[2] *and also citing any case or cases upon which counsel relied in arriving at his ultimate conclusion*" (emphasis supplied; 360 F.2d at 844-45; footnote omitted). The requirement for a suppporting memorandum "analyzing the case legally," standing alone or considered in conjunction

with the requirement for "citing any case or cases upon which counsel relied in arriving at his ultimate conclusion," obviously could have, and logically should have, produced an analysis of any of those things in the record "which might arguably support the appeal" as being *meritless,* consistent with the defender's opinion that an appeal would be frivolous. And while the Supreme Court in *Anders* stated that, "We indicate no approval of the requirements set out *in the statement* or in the cases" (emphasis supplied), it significantly did not indicate *disapproval* of such requirements, or any one of them. Surely, had the Supreme Court deemed the requirement for a defender to "file a supporting memorandum analyzing the case legally," which requirement would naturally and logically entail the defender's analysis of arguable points on appeal as meritless, as one denying so vital and valuable a constitutional right as that of effective assistance of counsel, it would have unequivocally indicated its *disapproval* of such requirement. It did not do so; and the necessary inference is that it did not do so because it saw no constitutional fault in such requirement, or in compliance therewith.

It is also clear from the key language in *Anders* above-quoted and from the Petition (*see* pars. 9, 15) that the relator herein views *Anders,* in its undoubted requirement that a defender provide some advocacy[3] for his client, even

---

[3] *Anders,* as is noted in Par. 9 of the Petition, states that the defender's role of advocate "requires that he support his (or her) client's *appeal* to the best of his ability" (emphasis supplied), *i.e., that if an appeal is taken,* the defender must then pursue it with all the vigor intelligence, and professional skill at his command. If the defender, however, seeks withdrawal on the ground an appeal would be frivolous, his advocacy for his client, though also obviously requiring "the best of his ability," is readily discerned as a different and more restricted one.

while seeking to withdraw on the ground that an appeal would be frivolous, as a requirement so inconsistent with the requirement of Rule 809.32(1) herein challenged as to make the latter requirement unconstitutional. This view, it is submitted, is also unsound. *Anders* does recognize that a defender seeking withdrawal for the above-mentioned reason is under obligation to submit a brief "referring to anything in the record that might arguably support the appeal"; and it is clear that *Anders*, while recognizing the meeting of such obligation as rendering a service to the court itself, also recognizes it as affording the defendant "that advocacy which a nonindigent defendant is able to obtain."[4] But nowhere does *Anders* state a holding that the rendering of such limited advocacy by a defender is constitutionally at odds with the defender taking the further step, completely unmentioned in *Anders*, of setting forth in the no merit brief, consistent with his/her belief that an appeal would be frivolous, the meritless character of the matters, if any, which might arguably support an appeal.

It is true, of course, that the Court in *Anders* stated that "This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain." 386 U.S. at 745. In the context of such sentence, "This requirement" would appear to mean the

---

[4] What a nonindigent defendant in Wisconsin receives under the Code of Professional Responsibility by way of services from his retained counsel in a situation where the latter contemplates withdrawal because an appeal from a criminal conviction would, in his judgment, be frivolous, is discussed in argument made below.

suggested procedure for a defendant to follow, relative to seeking withdrawal on the ground an appeal would be "wholly frivolous," outlined by the *Anders* court in the preceding paragraph. It is difficult, however, if not impossible, to discern just what the Court meant with its reference to "appointed counsel" not being forced, presumably under such procedure, "to brief his case against his client." The Court may conceivably have meant that such briefing was not required of the "appointed counsel" because under such procedure he was not required to quarrel with "any points" that defendant, under such procedure, could raise in his response to the no-merit brief. Assuming, however, that the Court viewed "appointed counsel" as not required to "brief his case against his client" because such procedure did not require him/her to argue in the no-merit brief that anything such counsel detected in the record as arguable supporting the appeal was meritless: so assuming, it does not then follow, the respondent submits, that the *Anders* court was thereby holding that a procedure requiring such action of a defender would be requiring him/her to engage in conduct denying his/her client effective assistance of counsel. And it is particularly dubious that the *Anders* court was so holding, in view of its failure, noted above, to condemn as unconstitutional a District of Columbia procedure which can reasonably be read, as above shown, as requiring a defender, albeit by more general language, to do that so specifically required by the language of Rule 809.32(1) herein challenged.

The respondent also submits, of which more below, that it is neither proper nor accurate to characterize a defender's discharge of his duty under the challenged por-

tion of Rule 809.32(1) as constituting a defender's "briefing his case against his client." Instead, the respondent submits, it constitutes, for reasons discussed *infra:* a) the giving of *full* advice to a defender's client as to why the defender believes an appeal would be frivolous; b) the giving of *full* advice to the court on that same subject; and c) the presentation of a logical complement in the no-merit brief to the defender's claim therein that to take an appeal would be frivolous, in the absence of which complement the defender occupies the illogical, indefensible, and paradoxical position, puzzling to and troublesome for his client, of or advising the court and his/her client that an appeal would be frivolous, while simultaneously advising the court and client of matters in the record, if any, which might arguably support the appeal. The obvious conflict in such advice, the respondent submits, can only be resolved by meeting the rule requirement under attack herein.

B.

The respondent submits that rather than producing such denial of a vital constitutional right, the challenged portion of Rule 809.32(1) protects and promotes such right by demanding of a defender an act which, when performed, will give his client a service a nonindigent client should and will presumably have from his retained counsel, acting in accord with the Rules of Professional Responsibility which obtain as to all lawyers practicing in Wisconsin.

This court has adopted what it terms "the modern standard for judging effective assistance of counsel" (*State v. Felton,* 110 Wis. 2d 485, 500, 329 N.W.2d 161 (1983)), such standard being this:

> Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation *must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services.* (Emphasis supplied; *State v. Harper,* 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973).)

S.C.R. 20.06(8) (f), as part of the Code of Professional Responsibility above-mentioned, provides in pertinent part that,

> Trial counsel for a convicted defendant should continue to represent his or her client *by advising whether to take an appeal* and if the appeal is prosecuted by representing him or her through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court. (Emphasis supplied.)

Respondent submits that it is plain that "the ordinarily prudent lawyer, skilled and versed in criminal law," in the course of his/her representation of a client who had privately retained his/her services, and who had been convicted, would undoubtedly follow the ethical consideration of advising such client whether to take an appeal, and in so doing, if his/her advice to such client were that an appeal would be frivolous, would undoubtedly further advise him/her, fully and precisely, as to why it was frivolous, with the latter advice informing such client of any matter that might arguably support the appeal, *accompanied by advice as to just why such matter lacked merit.* It is, the respondent submits, unthinkable that such "ordinarily prudent lawyer, skilled and versed in the criminal law" would give such client anything less by way of such advice on "whether to take an appeal," and especially

unthinkable that he/she would withhold from such client the information as to why his/her lawyer believed meritless any matter in the record which might arguably support such appeal. This would be true because the client, given the first two elements of such advice, but not the third, would reasonably and predictably find such elements conflicting, and quandary-creating, and would require the third element thereof for a clear understanding of why the appeal would be frivolous.

The above-described advice then, clearly constituting representation which "the ordinarily prudent lawyer, skilled and versed in criminal law," would give a client "who had privately retained his services," and who had been convicted, it ineluctably follows that a defender, giving such advice to the court *and to his client* under Rule 809.32(1), including the advice required under the challenged portion thereof, is, under the "modern standard for judging effective assistance of counsel" which has been adopted in Wisconsin, rendering *effective* assistance to his client. And here it should be observed that were the giving of such advice not required by such rule (as would be the case were the challenged portion thereof stricken), one could, it is submitted, confidently predict that many, if not most, of the attorneys to whom sec. (Rule) 809.32(1), Stats., applies would meet what would then be its *sole* requirement of filing with the court, and serving on their clients, "a brief in which is stated anything in the record which might arguably support the appeal," but would not go further and then provide their clients with a reasoned, helpful, and quandry-dispelling explanation as to why the things in the record "which might arguably support the appeal" were devoid of merit.

The providing of such explanation might in many instances, if not most, involve considerable and difficult legal labor, consuming much time and effort; and it may well be reasonably doubted that such explanation would often be provided a defendant, whose attorney had been appointed under sec. (Rule) 809.30, Stats., or under ch. 977, Stats., were it not required, as now, by sec. (Rule) 809.32(1), Stats.

There are other aspects of the Code of Professional Responsibility which also indicate that the defender, complying with the challenged portion of Rule 809.32(1) by discussing "why the issue lacks merit" is not depriving him/her of effective assistance of counsel. Such aspects of such Code are these:

(a) The provision of S.C.R. 20.34(2) (b) that, "A lawyer as adviser furthers the interest of his or her client *by giving his or her professional opinion as to what he or she believes would likely be the ultimate decision of the courts on the matter at hand . . .*" (emphasis supplied).

(b) The provision of S.C.R. 20.34(3) (e) that, "The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. *A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it*" (emphasis supplied).

(c) The provision of S.C.R. 20.36(1) (b) that,

> 1. In his or her representation of a client, a lawyer may not:
>
> . . .

> b. *Knowingly, advance a claim or defense that is unwarranted under existing law,* except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law. (Emphasis supplied.)

Also supporting this sub-argument of the state is Standard 21-3.2, A.B.A. Standards for Criminal Justice. This standard, which provides that , "(b) Counsel for a defendant-appellant should not seek to withdraw from a case because of counsel's determination that the appeal lacks merit," nevertheless provides that, "Appellate counsel should give a client *his or her best professional evaluation of the questions that might be presented on appeal* . . ." (emphasis supplied; Standard 21-3.2(b) (i)). Such evaluation would surely include, if such counsel believed the appeal would be wholly frivolous, a discussion of what matters in the record might arguably support the appeal, *and why they were meritless;* a discussion, of course, which would serve the same purpose of giving full and candid advice to the defendant as that served by a no-merit brief meeting all the requirements of Rule 809.32(1), including that challenged herein.

It is noteworthy, too, that A.B.A. Standard 4-51(a) (referred to in *State v. Felton, supra,* 110 Wis. 2d at 506, as "A.B.A. Defense Function Standard 5.1(a)") reads: "After informing himself or herself fully on the facts and the law, the lawyer should advise the accused *with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome*" (emphasis supplied). This standard, with its reference to "the accused," is apparently designed for trial counsel to follow,

prior to conviction or acquittal, rather than appellate counsel; but there can assuredly be no good reason why a defender, believing an appeal to be frivolous, and therefore seeking withdrawal, should not, in *rendering his client effective assistance of counsel,* advise him/her "with compplete candor concerning all aspects of the case" in its post-conviction posture, "including a candid estimate of the probable outcome." Clearly, such advice would include *all* of tha (sic) required by Rule 809.32(1).

It might be argued, of course, that while the giving of such advice to the defender's client is effective representation of counsel, it is not effective representation of counsel, but a denial thereof, to give the same advice to the court. Such an argument, however, would be based on the plainly untenable proposition that the defender must be candid with his client, but decidedly less than candid with the court, withholding from it his/her helpful explanation that the record matters cited in the no-merit brief as things which might arguably support the appeal were, in his/her judgment, meritless.

To sum up then, this sub-argument, the respondent submits that a defender complying with the challenged portion of Rule 809.32(1) in fact and in law renders effective assistance of counsel to his/her client by according him/her, through such compliance, representation clearly "equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services."

C.

It is clear from the Petition that the relator believes that *Anders* condemns as a denial of effective assistance of counsel any functioning by the defender as an *amicus*

curiae when he seeks withdrawal on the ground that an appeal would be "wholly frivolous"; with the relator entertaining the additional belief that the act required of a defender under the challenged part of Rule 809.32(1) is that of *amicus curiae.* As above-shown and as argued more fully *infra,* respondent submits that such act is in fact one of advocacy for the defendant. It further submits, however, that one must misread *Anders* to conclude that it voices the above-described condemnation. It is true that *Anders,* as above shown, states that, "The constitutional requirement of substantial equality and fair process can only be attained *where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae"* (emphasis supplied). Read in a void, such sentence might appear to forbid a defender, seeking withdrawal because an appeal would be "wholly frivolous," from acting as *amicus curiae* in the withdrawal-seeking procedure. But *Anders* language which follows very plainly shows that the *Anders* court viewed *with approbation* the assistance which would be rendered a court wherein there was employed the procedure which *Anders* suggested be followed in the situation where a defender sought to withdraw on the ground an appeal would be "wholly frivolous." Such approbation, the state submits, is clearly given in the following portion of *Anders:*

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review *because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel.* The no-merit letter, on the other hand,

> affords neither the client nor the court *any aid.* The former must shift entirely for himself while the court has only the cold record which is (sic) must review *without the help of an advocate.* . . . (Emphasis supplied.)

Plainly, *Anders,* in its above-quoted portion, was asserting that a court would receive *amicus curiae* aid from a defender following the suggested "withdrawal" procedure set forth in *Anders,* which a court could not and did not receive from a "no-merit" letter such as was involved therein.

The petition shows reliance not only on *Anders* as allegedly supportive of relator's position herein, but also on *Evitts* as being so. Par. II of the Petition reads:

> The United States Supreme Court very recently has reaffirmed its prior holding in *Anders,* stating that the attorney ' . . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim.' *Evitts v. Lucey,* 83 L. Ed.2d at 828.

And Par. 15 of the Petition asserts that the action required under the challenged portion of Sec. (Rule) 809.32(1) "would be directly contrary to the *mandates* of *Anders* and *Lucey* [*Evitts*] that the attorney not brief the case against the client and that the attorney act as an advocate" (bracketed material and emphasis supplied). As above-shown, *Anders* clearly does *not* contain the "mandates" attributed to it by this part of the Petition; and just as clearly, *Evitts* contains no such "mandates." There was involved in *Evitts no question at all relative to precisely what "appointed counsel" could constitutionally do, or not do, while seeking withdrawal on the ground an*

appeal would be "wholly frivolous" and the portion of the sentence from *Evitts*[5] quoted in Par. 11 of the Petition is plainly nothing but a somewhat inaccurate paraphrase of a part of one sentence from *Anders* ("The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to *amicus curiae*"), a sentence discussed above as readily susceptible of misinterpretation if read in a void.

The Petition, Par. 12, also shows the relator placing some reliance on *Blackwell* as supportive of his position. But the language from *Blackwell* quoted in Par. 12, Petition, provides, it is submitted, no support for relator's attack on sec. (Rule) 809.32(1), Stats. The murky closing sentence thereof which reads, "The objective [sic] of these potential claims is for the court's determination, not the advocates" (emphasis and bracketed material supplied), if reasonably read as meaning, "The merit of these potential claims is for the court's determination, not the advocate's," states a proposition with which the challenged portion of sec. (Rule) 809.32(1), Stats., is not at all in conflict. Such portion requires only that the attorney to whom such rule applies, having stated in his or her no-merit brief "anything in the record that might arguably support the appeal," must then present "a *discussion* of why the issue lacks merit" (emphasis supplied). Such required "discussion" is obviously no more than that, and

---

[5] Such sentence reads in full: "But the attorney must be available to assist in preparing and submitting a brief to the appellate court [authority omitted] and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." 83 L. Ed.2d at 828.

is not intended to and does not, in any sense or degree, infringe upon what is clearly the court's power to make the determinatian as to whether or not what *Blackwell* terms "the potential claims" are meritless.

The defendant also vainly seeks some measure of support for his position in Wisconsin case law, doing so by asserting in Par. 10 of the Petition that the Wisconsin no-merit procedure which was in existence prior to the creation of Rule 809.32(1) "did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State*, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972) . . ." (emphasis supplied).

In pertinent part, *Cleghorn v. State* reads:

> . . . If the appointed attorney concludes an appeal would be frivolous, he prepares a no-merit brief and sends a copy of it to the indigent, who is given fifteen days in which to comment thereon to the supreme court. The instructions to counsel *do not require him to argue against his client* but demand a fair evaluation of the record and a search for meritorious arguments grounded thereon. . . . (Emphasis supplied; 55 Wis. 2d at 472.)

Plainly, the mere observation that "The instructions to counsel do not require him to argue against his client" does not, expressly or impliedly, condemn as a denial of the right to effective assistance of counsel the rule requirement herein challenged.

With *Cleghorn* in mind, it is certainly worthy of note that four of the Justices of the Supreme Court who were on the Court when *Cleghorn* was decided, were members

thereof when, in 1978, it adopted, *inter alia,* Rule 809.32, including the portion challenged herein.[6]

It is submitted that it is palpably absurd to suppose that such four Justices would have acted favorably on the adoption of Rule 809.32, containing the portion thereof herein challenged, had they for a moment believed that the language of *Cleghorn* above-quoted expressed or implied a belief that requiring a defender to do that which the challenged portion of Rule 809.32(1) requires would produce a denial of effective assistance of counsel to the defendant's client. And it is equally absurd to suppose that such four justices would have acted favorably on the adoption of such rule, with its specific reference to *Anders,* had they for a moment believed that *Anders* condemned as unconstitutional a key portion of such rule.

To sum up, then, the position of the State in this subargument, it is that *Anders, Evitts, Blackwell,* and *Cleghorn,* whether considered jointly or severally, simply do not enunciate any "mandate," adjudication or ruling that shows that the portion of Rule 809.32(1) herein challenged imposes a requirement on the defender which, if met, produces a denial to his client of effective assistance of counsel.

Several state courts have handed down decisions strongly supportive of the position taken by respondent in this argument.

One of such decisions is found in *Com. v. McClendon,* Pa. 434 A.2d 1185, 1187-88 (S. Ct. of Pa. 1981). Such

---

[6] Such Justices were Justice (now Chief Justice Nathan S. Heffernan; Justice (and by 1978, Chief Justice) Bruce F. Beilfuss; Justice Leo B. Hanley; and Justice Connor T. Hansen.

case did *not* involve a constitutional challenge to a Pennsylvania counterpart of the portion of Rule 809.32(1) here under attack; but what it did involve was a submission of a no-merit brief by appointed counsel which, *inter alia,* contained the very thing required by such rule portion, namely, in the language of such case, "counsel's statements in the brief as to why the arguments were wholly lacking in merit" (434 A.2d at 1188) and "his [appointed counsel's] explanation of *why there is no basis for an appeal*" (bracketed material and emphasis supplied; *Id.*). In finding no ineffective representation of counsel by reason of such feature of the no-merit brief involved, the Supreme Court of Pennsylvania in *McClendon* rejected and overturned two of its earlier decisions under which a no-merit brief, including such feature, would have been viewed as ineffective representation of counsel, such cases being *Commonwealth v. Perry,* 346 A.2d 554, 555 (S. Ct. of Pa. 1975) and *Commonwealth v. Collier,* 413 A.2d 680, 681 (S. Ct. of Pa. 1980). In so doing the Court quoted at length from *Commonwealth v. Perry,* with the closing part of such quotation reading as follows:

> In his brief, after a recitation of the facts and pertinent law, counsel in a conscientious effort to be honest with the court, *then proceeded to demonstrate by reference to the record why the instant appeal is meritless. This counsel may not do.* Just as counsel may not assume the role of *amicus curiae* when he represents a client, so too, when counsel seeks to withdraw, he may not assume that role when presenting to the court anything that might arguably support an appeal. We repeat counsel's role is not that of *amicus curiae.* (Emphasis supplied.)

McClendon then stated:

The dilemma created by the *Perry* reasoning becomes apparent when we consider the definition of the term "wholly frivolous" adopted in this jurisdiction. *Commonwealth v. Greer, supra.* If the *Greer* definition of "wholly frivolous" means that there are no points present that "might arguably support an appeal" counsel is saddled with an impossible burden, if he is nevertheless required to file a brief containing arguments that are non-existent. If on the other hand, there are claims of arguable merit, even though counsel may not have any confidence in them, under *Greer* the appeal is not "wholly frivolous" and counsel is not entitled to seek leave to withdraw. *Commonwealth v. Greer, supra.* Thus following the *Perry* rationale to its logical conclusion the right of counsel to seek leave to withdraw would be illusory. We do not believe that such a result was ever intended by the United States Supreme Court.

The core of the *Anders'* reasoning is that where an accused is entitled to a counselled appellate review, that right should not be denied or diminished solely because of indigency. However, *Anders* does not require that counsel be forced to pursue a wholly frivolous appeal just because his client is indigent. *The major thrust of Anders was to assure a careful assessment of any available claims that an indigent appellant might have. That end is achieved by requiring counsel to conduct an exhaustive examination of the record* and by also placing the responsibility on the reviewing court to make an independent determination of the merit of the appeal. These requirements were clearly satisfied here. *What does present the problem is that the counsel's brief would not appear to meet the standards set by Commonwealth v. Collier, supra and Commonwealth v. Perry, supra. These cases would seem to suggest that counsel's statements in the brief as to why the arguments were wholly lacking in merit evidenced counsel's failure to assume the role of an advocate. At the same time, counsel's right to withdraw is dependent upon his certification that he fully studied the record and found no merit in the appeal.*

The fallacy in a strict adherence to the Perry rationale is obvious. Once we are satisfied with the accuracy of counsl's assessment of the appeal as being wholly frivolous, counsel has fully discharged his responsibility. The role of an advocate, insisted upon in *Anders, refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal. Where counsel has in good faith satisfied that obligation and found the appeal to be wholly frivolous, he can do not [sic] more. We reject the view that his explanation of why there is no basis for an appeal should be interpreted as reflecting counsel's lack of concern in the client's cause. Nor can that fact be assigned as a reason for concluding that the client did not receive this constitutionally protected right of representation.* (Emphasis supplied.)

A second state court decision strongly supportive of respondent's position is *State v. McKenney,* 568 P.2d 1213, 98 Idaho 551 (1977). In such case, the Supreme Court of Idaho, setting forth "new guidelines governing duties of appellate counsel in the representation of indigent criminal defendants on appeal" and in so doing ruling that once counsel was appointed to represent an indigent client during appeal in a criminal case, he could not thereafter be permitted to withdraw therefrom on the basis that appeal was frivolous or lacked merit, stated, with respect to the cases of the two defendants-appellants involved:

> In each case the respective attorney examined the record and concluded that no meritorious grounds on appeal were presented. They so advised this Court

and their respective clients. Both filed briefs in which were outlined any possible arguments which could be raised in favor of their clients' appeal *and therein pointed out why such arguments would be frivolous. That procedure accords with previously enunciated standards and the principles set forth in Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed.2d 493 (1967). See also Idaho Appellate Rules 45(b).*

This holding, too, it is submitted, clearly supports the portion of Rule 809.32(1) attacked herein, finding the action of counsel required thereby to be in conformity with *Anders,* not in conflict therewith as is herein claimed by the relator.

It should be observed, however, that there is a case which disagrees with *Com. v. McClendon* and *State v. McKenney,* which case appears to condemn as "constitutionally inadequate" the action of counsel required by the challenged portion of Rule 809.32(1), though it goes significantly unmentioned in the petition. Such case is *Suggs v. United States,* 391 F.2d 971, 972-974 (D.C. Cir. 1968). This case is quoted (and relied upon) in one of the dissenting opinions filed in *Com. v. McClendon. See* 434 A. 2d at 1190. The State submits, however, that the better law is that found in *Com. v. McClendon* and *State v. McKenney.* And it would also appear that the *Suggs* holding has found no favor elsewhere, perhaps because its unconvincing nature is shown by its apparent belief that an appointed counsel, by showing the meritless character of any matters that might arguably support the appeal in his/her no-merit brief, might stifle or "undercut" the prospects of the client's rehabilitation! *See* 391 F.2d at 974-975.

Were a defender, who in his/her no-merit brief had complied with the rule requirement herein challenged, to

then ask the defendant, as the Apostle Paul did the Galatians, "Have I therefore become your enemy because I tell you the truth?" (Gal. 4:16), *Suggs* would answer "Yes." But how wrong such answer would be is shown, it is submitted, not only by *McClendon* and *McKenny,* but also by *Suggs* itself, in its well-reasoned dissent. *See Suggs,* 391 F.2d at p. 979-981, and especially the following portion of the dissent:

> After my study of the appellant's points and the presentation by counsel, *I will not say they had briefed the case "against" their client.* They noted rather each and every claim advanced by *Suggs* and cited seriatim the decisions of this court which had already disposed of each such claim. *It was not the brief which was "against" Suggs—the facts and the law were against him.* (Emphasis supplied; 391 F.2d at p. 980.)

E.

Finally, it is submitted that the Sixth Amendment cannot be logically or reasonably viewed as precluding a defender from giving a full and reasonable explanation to the Court of Appeals of why he believes an appeal would be frivolous. Such an explanation would not be given, of course, under a procedural rule confining the defender, believing an appeal to be frivolous, to presentation only of those matters which might arguably support the appeal, without any explanation of why such matters were meritless. The Court of Appeals should have the benefit of such an explanation, presented in the "discussion" required by sec. (Rule) 809.32(1), Stats., in passing judgment under sub. (3) of such rule as to whether "further proceedings would be frivolous and without any arguable merit", so as to warrant relieving the defender "of further responsibility

in the case." And perhaps even more important, the defendants should have the benefit of such explanation, which should assure him/her that the defender has given full and careful consideration to those matters which might arguably support the appeal, and found them meritless for good (or what defender believes to be good) reasons. The defender, it is submitted, has a professional right to submit such explanation; and indeed, with reference to the defendant, the defender, it is submitted, has both a professional and moral *duty* to give such explanation to the Court of Appeals and to the defendant. Without supplying such explanation to the court and to his/her client, the defender is in the unenviable, unprofessional, and even immoral position of seeking to withdraw from representation of the defendant on an appeal on the basis that an appeal would be frivolous, while simultaneously pointing out to the Court of Appeals matters which would arguably support the appeal! Surely the Sixth Amendment was not intended to, and does not, require a defender to demean himself/herself and the profession of the law by occupying such an ignominious position, so detrimental to his/her client, so unhelpful to the Court of Appeals, and so professionally and morally unacceptable both to the defender and his client. Indeed, respondent submits that the Sixth Amendment, rather than prohibiting what is required by the challenged portion of sec. (Rule) 809.32(1), Stats., *requires* the performance of that very act to assure defendant effectively *plenary* representation of counsel at the stage where the performance of such act is specifically required by the rule in question.

V. THE PETITION, INSOFAR AS IT SEEKS, IN THE LANGUAGE OF THIS COURT, "A DECLARATORY JUDGMENT THAT SEC. (RULE) 809.32(1), STATS., TO THE EXTENT THAT IT REQUIRES AN ATTORNEY APPOINTED TO REPRESENT A CRIMINAL DEFENDANT IN AN APPEAL TO DISCUSS IN A NO-MERIT BRIEF WHY THE ISSUES THAT MIGHT ARGUABLY SUPPORT THE APPEAL LACK MERIT, IS UNCONSTITUTIONAL" SHOULD BE DENIED BECAUSE A PRESUMPTION OF CONSTITUTIONALITY IS OPERATIVE AS TO THE PORTION OF SEC. (RULE) 809.32(1) HEREIN CHALLENGED; SUCH PRESUMPTION DERIVES ADDED STRENGTH FROM THE NATURE OF THE CREATOR OF SUCH RULE, AND THE AWARENESS OF *ANDERS* EXPRESSED THEREIN; AND SUCH STRENGTHENED PRESUMPTION MILITATES AGAINST THE GRANTING OF THE PETITION IN ITS ASPECT ABOVE MENTIONED.

The presumption of constitutionality which obtains as to a statute is so well known as to require no citation of authority; and "The same presumption applies with respect to decisions or orders of an administrative body or officer exercising powers pursuant to statutory authority, . . . " 16 C.J.S., Constitutional Law, sec. 97, pp. 310-11. The author of this memorandum has been unable to find authority (though confident it exists) that the procedural rule of a court is entitled to such presumption; but it would be absurd to suppose otherwise, where the author of such rule, as here, is the highest court of a state. It is submitted, then, that sec. (Rule) 809.32(1), including, of course, its challenged portion, is clearly entitled to a presumption of constitutionality, which militates against the

granting of the petition, insofar as it seeks a determination of the claimed constitutional invalidity of the challenged rule portion, and its striking.

Such presumption, the respondent submits, must be viewed as appreciably stronger than that operative as to a statute or administrative agency rule, by reason of the very nature of its author. Surely the highest court of a state must be expected, in its procedural rule-making, to have exercised greater skills in avoiding constitutional pitfalls, than would a state legislature or a state administrative agency, because such court can draw on its treasury of legal knowledge to avoid adoption of an unconstitutional procedural rule. And with respect to the rule in question, the presumption of its constitutionality is not only strengthened by the character of its creator, but by the fact that it express reference to *Anders* shows the Supreme Court's knowledge of such case, which presumably included a sophisticated appreciation of its constitutional meanings, express or implied.

VI. THE PETITION, INSOFAR AS IT SEEKS, IN THE LANGUAGE OF THIS COURT, "A SUPERVISORY WRIT TO PROHIBIT THE COURT OF APPEALS FROM STRIKING THE NO MERIT BRIEF PREVIOUSLY FILED IN THE APPEAL AND ORDERING COUNSEL FOR THE DEFENDANT TO PROVIDE REASONS WHY THE ISSUES PRESENTED IN THAT BRIEF LACK MERIT" SHOULD BE DENIED, NOT ONLY BECAUSE THE BRIEF FILED BY RELATOR IN THE COURT OF APPEALS FAILS TO MEET THE VALID REQUIREMENT OF THE CHALLENGED PORTION OF SEC. (RULE) 809.32 (1), STATS., BUT ALSO BECAUSE SUCH

BRIEF VIOLATES SUCH RULE IN THAT, IN A MANNER PATENTLY INCONSISTENT WITH ITS REPRESENTATION THAT AN APPEAL WOULD BE FRIVOLOUS, IT PRESENTS ARGUMENTS IN BEHALF OF THE RELATOR PRECISELY AS THEY WOULD BE PRESENTED IN THE ORDINARY, INITIAL BRIEF OF A DEFENDANT-APPELLANT ON A CRIMINAL APPEAL, WITH THEIR PRESENTATION OF SUCH ARGUMENTS IN CLEAR CONFLICT WITH BOTH *ANDERS* and SEC. (RULE) 809.32(1), STATS.

As is shown by arguments made *supra,* the challenged portion of sec. (Rule) 809.32(1) is clearly valid; and for that reason alone, the respondent submits, the supervisory writ sought by relator herein should not issue.

Even if, however, the challenged requirement of sec. (Rule) 809.32(1) were to be found invalid by this Court, it is submitted that a substantial reason exists why such writ should not issue. Such reason is that a significant portion of the purported no-merit brief filed by relator in the Court of Appeals, District I, and entitled "Brief of Defendant-Appellant" is in clear conflict with both sec. (Rule) 809.32(1) and with *Anders.* Both the suggested withdrawal procedure set forth in *Anders* and such rule require appointed counsel to direct the Court's attention to matters in the record, if any, which might arguably support the appeal, but neither such rule nor *Anders* contemplates or permits the presentation of such matters in the form of arguments made in behalf of the defendant-appellant, in form and content *completely undistinguishable from arguments which would be made in the initial brief of a defendant-appellant on a criminal appeal.* The "Brief of Defendant-Appellant" filed herein (pp. 120-135, Ap-

pendix to Petition), consistent with sec. (Rule) 809.32(1) and the suggested withdrawal procedure of *Anders*, contains the defender's representation that "This attorney has concluded that further appellate proceedings on behalf of Mr. McCoy *would be frivolous and without any arguable merit* within the meaning of *Anders v. California*, 386 U.S. 738 (1967) and Rule 809.32(1)"; but such brief then goes on, in its major portion (pp. 4-15) and throughout the first paragraph of its "Conclusion," at p. 16, to take on precisely the form of the initial brief of a defendant-appellant which is customarily presented on a criminal appeal, with such major portion of the Brief of Defendant-Appellant, at pp. 11-15, presenting four arguments, with no indication whatsoever that the relator's counsel views them as anything other than completely meritorious arguments, unequivocally advanced in behalf of the relator, and certainly with no indication that they are intended to be presented, or are presented, as mere matters of record which "might arguably support the appeal." Plainly, the Brief of Defendant-Appellant, accurately enough *not* labelled as a no-merit brief, signally flunks the test of what a no-merit brief should be, even if such brief were not required to present, as required by sec. (Rule) 809.32(1), "a discussion of why the issue lacks merit." In so doing, it provides still another sound reason for denying relator the supervisory writ he seeks herein.

CONCLUSION

For the reasons above shown, respondent submits that insofar as the Petition seeks to invoke the original jurisdiction of this Court herein, it should be granted; but that it should be denied insofar as it seeks the declaratory

judgment relief and supervisory writ relief described therein.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

JAMES H. McDERMOTT
Assistant Attorney General

Attorneys for Respondent

by: /s/ James H. McDermott
Assistant Attorney General

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859

OFFICE OF THE CLERK
SUPREME COURT
STATE OF WISCONSIN
Madison, March 27, 1986
(Title omitted in printing)
Order
Case No 86-0172-W

On January 24, 1986 a petition was filed seeking a supervisory writ to prohibit the Court of Appeals from striking the no merit brief previously filed in the appeal and ordering counsel for the defendant to provide reasons why the issues presented in that brief lacked merit. The petition also sought a declaratory judgment that sec. (Rule) 809.32(1), Stats., to the extent that it requires an attorney appointed to represent a criminal defendant in an appeal to discuss in a no merit brief why the issues that might arguably support the appeal lack merit, is unconstitutional. With respect to the latter, the petition constitutes a request for leave to commence an original action, pursuant to sec. (Rule) 809.70, Stats.

Pursuant to the court's February 21, 1986 order, a response to the petition was filed in which the respondent concurred in the request to commence an original action for declaratory judgment but objected to the granting of a supervisory writ of prohibition.

On March 13, 1986 the petitioner filed a motion requesting permission to file a brief or a reply to the respondent's brief submitted with the response. The respondent filed a response in opposition to the motion on March 19, 1986.

IT IS ORDERED that the petition, insofar as it seeks a declaratory judgment with respect to the constitutionality of sec. (Rule) 809.32(1), Stats., is granted.

IT IS FURTHER ORDERED that the petitioner shall file a brief on the merits within 40 days of the service of this order; within 30 days of the service of the petitioner's brief the respondent shall file a brief or a statement that no responsive brief will be filed; within 15 days of the service of the respondent's brief the petitioner shall file a reply brief or a statement that a reply brief will not be filed.

IT IS FURTHER ORDERED that the petition, insofar as it seeks a supervisory writ of prohibition, is held in abeyance pending further order of the court.

MARILYN L. GRAVES

Supreme Court of Wisconsin

(Title omitted in printing)

No. 86-0172-W. Argued January 5, 1987.—Decided April 9, 1987.

ABRAHAMSON, J., HEFFERMAN, C.J. and BABLITCH, J., dissent.

PETITION for declaration of rights. *Rights declared.*

For the petitioner there were briefs and oral argument by *Louis B. Butler, Jr.*, assistant state public defender.

For the respondent the cause was argued by *James H. McDermott,* assistant attorney general, with whom on the brief was *Bronson C. La Follette,* attorney general.

LOUIS J. CECI, J. In this original action for a declaratory judgment, we are called upon to consider the constitutionality of sec. (Rule) 809.32(1), Stats. (1983-84),[1] which requires that appointed counsel, upon determining that a criminal appeal would be frivolous, submit a brief to the court of appeals which includes an explanation as to why any issues which might arguably support an appeal lack merit. Petitioner Louis B. Butler, the public defender in this case who was assigned to handle the appeal of defendant Ellis T. McCoy's criminal conviction, asserts that

[1]Section 809.32(1) provides that, "If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service."

the defendant's constitutionally protected right to counsel, guaranteed by the sixth amendment to the United States Constitution and by art. I, sec. 7 of the Wisconsin Constitution, is violated by the so-called "no-merit brief" requirement. We disagree and now uphold the constitutionality of the rule contained in sec. 809.32(1).

The facts in this case are not indispute. The defendant was convicted in Milwaukee county circuit court on December 2, 1983, of one count of second-degree sexual assault, sec. 940.225(2)(a), Stats., and of one count of abduction, sec. 940.32(1).[2] In preparing for the appeal, petitioner concluded that further appellate proceedings were not warranted and that any issues which could be advanced in support of an appeal were without arguable merit under *Anders v. California,* 386 U.S. 738 (1967), and under sec. 809.32(1). Defendant was then advised of his available options, which included (1) voluntarily dismissing the appeal, (2) proceeding with the appeal *pro se,* or (3) submitting a no-merit brief, pursuant to sec. 809.32(1), to the appeals court. Defendant chose the no-merit brief option.

Prior to filing a no-merit brief, however, petitioner filed a motion in the appeals court, seeking to determine the constitutionality of sec. 809.32(1) and to clarify the scope of representation on appeal. The motion was denied on September 7, 1984, on standing grounds, with the appeals court stating that since the no-merit brief had not yet been filed, no justiciable controversy existed.

Petitioner filed a no-merit brief on October 22, 1984. The appeals court, on April 16, 1985, ordered that this

[2]*State v. Ellis T. McCoy,* No. 84-929-CR-NM.

brief be struck for noncompliance with sec. 809.32(1) and that a new brief be filed. Petitioner's brief complied with the requirements set forth in sec. 809.32(1), except that it did not contain a statement of reasons why the issues which might arguably support an appeal lacked merit.

Counsel petitioned this court on April 24, 1985, for a supervisory writ of prohibition and declaration of relator's rights, seeking to resolve the constitutional issue. On May 8, 1985, this court denied the petition, on the grounds that petitioner had an adequate remedy at law in the court of appeals. Petitioner renewed his motion in the court of appeals to determine the constitutionality of sec. 809.32(1), and the court again denied the motion, stating that any determination of the constitutionality of the no-merit rule should be made by this court. Thereafter, defense counsel renewed his petition to this court, which was granted on March 27, 1986.

Petitioner asserts that defendant's constitutionally guaranteed right to counsel, which includes the right to effective assistance of counsel, *State v. Ludwig*, 124 Wis. 2d 600, 606, 369 N.W.2d 722 (1985); *Strickland v. Washington*, 466 U.S. 668, 686 (1984), is violated by the no-merit requirement contained in sec. 809.32(1). Petitioner cites the decision of the United States Supreme Court in *Anders*, which is explicitly referred to in Wisconsin's no-merit rule, as the primary source of support for this conclusion. We agree that *Anders* should be the touchstone of our analysis, although we do not believe that it compels a finding of unconstitutionality. We therefore begin our discussion of an attorney's responsibilities to a criminal client upon appeal with an analysis of *Anders*.

In *Anders*, defense counsel, after consulting with his client and studying the trial record, determined that further appellate proceedings on behalf of his indigent client would be meritless. He so notified the appeals court by letter[3] and requested to withdraw as counsel for the defendant. The Court in *Anders* did not believe that counsel's letter, articulating only a "bare conclusion" regarding the merits of defendant's appeal, satisfied constitutional requirements. 386 U.S. at 742.

The procedure followed by defense counsel in *Anders*, the high Court held, was constitutionally defective because it "did not furnish petitioner with counsel acting in the role of advocate," *id.* at 743, and "[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed of that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity." *Id.* at 744. The Court then explained what counsel's proper role on appeal should be:

> "[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full exami-

---

[3]Counsel's letter stated, " 'I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him . . . [H]e wishes to file a brief in this matter on his own behalf.' " 386 U.S. at 742.

nation of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id.*

"The utility of this procedure is that appointed counsel would not be force[d] . . . to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate. Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—are are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Id.* at 745.

The Wisconsin procedure goes beyond *Anders* and requires that the attorney file a brief which, in addition to articulating anything in the record which might support an appeal, includes a statement indicating why the appeal lacks merit. It is this latter requirement to which the petitioner objects and on which we now focus.

Petitioner contends that the discussion requirement is directly contrary to the court's admonition in *Anders* that counsel on appeal is not to act as *amicus curiae*, but rather is obligated to act as advocate to the best of his or her ability. For support, petitioner additionally cites *Evitts v. Lucey*, 469 U.S. 387 (1985), which states that, citing *Anders*, appellate counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Id.* at 394. He asserts that when counsel is required to discuss the reasons why an appeal lacks merit, he or she is in effect abdicating the advocate's role and is instead arguing against the client. This, petitioner argues, is proscribed by *Anders*.

In addition, petitioner argues that a simple definitional approach compels a finding that if counsel is required to comply with the no-merit rule, he or she is no longer "advocating" appellant's cause.[4] When counsel files a no-merit brief which complies with the discussion requirement, petitioner argues, he or she is merely acting as *amicus curiae*, advancing a rationale which is more consistent with the views of the court than with the views and interests of defendant, counsel's client.[5]

---

[4]According to petitioner, an advocate "is one who supports, defends or pleads another's cause."

[5]Petitioner offers two definitions of *amicus curiae*, citing *Black's Law Dictionary* 75 (5th ed. 1979), which states that *amicus curiae* "means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views." Also cited is *Webster's New World Dictionary* 44 (2d ed. 1972), defining *amicus curiae* as "a person who offers, or is called in, to advise a court on some legal matter."

Petitioner then surveys cases from other jurisdictions which ostensibly support his position that appellate counsel must not deviate from the advocate's role and that the Wisconsin procedure is at odds with that principle. These cases, petitioner argues, demonstrate that counsel is not to play any part in determining the merits of the appeal. *See, e.g., State v. Allen,* 99 N.J. Super. 314, 322, 239 A.2d 675, 679 (1968), stating that "[o]nce a defendant exercises his right to appeal, his appellate counsel must be an advocate and he does not decide whether the claim will be successful as argued by the State. . . . That task is for the courts."

We do not mean to disparage the importance of counsel's role as advocate. We are sensitive to the rights of a criminal defendant, especially an indigent defendant, to effective representation. We have previously recognized, in a case decided prior to the enactment of the no-merit rule, that the *Anders* analysis compels appointed counsel to "perform his duties as adequately as paid counsel so the indigent will not be deprived of adequate representation because of his indigency." *Cleghorn v. State,* 55 Wis. 2d 466, 471, 198 N.W.2d 577 (1972). We reaffirm our belief in that principle. However, we are nevertheless compelled to reject petitioner's proffered analysis.

We now uphold the constitutionality of the no-merit brief rule. While *Anders* does not sanction the use of the discussion requirement, it does not proscribe it, either. Our interpretation of *Anders* is consistent with cases which have validated the discussion requirement and which have construed that requirement to harmonize with, rather than diverge from, the *Anders* holding. *See, United States v.*

Edwards, 777 F.2d 364 (7th Cir. 1985); *Nickols v. Gagnon,* 454 F.2d 467 (7th Cir. 1971). The court in *Edwards* explicitly reaffirmed the attorney's obligation to file a brief which includes a statement indicating why arguments ostensibly supporting an appeal are without merit. 777 F.2d at 365-66. Similarly, in *Nickols,* the seventh circuit examined the adequacy of a letter, which included a discussion of "matter[s] demonstrating the absence of merit [of issues arguably supporting an appeal]," submitted by the defense attorney who was seeking to withdraw as counsel. 454 F.2d at 469. In deciding that the letter was adequate, the court contrasted counsel's letter which "included a reasoned exposition of the basis for his conclusion," *id.,* with the short letter submitted by counsel in *Anders,* which contained only a "conclusory statement" of the frivolity of the appeal. *Id.,* n. 4. Thus, the court in *Nickols* also contemplated, consistent with sec. 809.32(1), Stats., the discussion requirement and, further, did not believe that *Anders* in any way prohibited it. Likewise, we do not believe that *Anders* in any way prohibits it. Petitioner's reliance on *Evitts* is also misplaced, because it does not prohibit the discussion requirement, either.

Petitioner argues that when an attorney submits a statement which includes a discussion of why his or her client's appeal lacks merit, that attorney is, in effect, like the judge, "deciding" the merits of the appeal. This, petitioner argues, is impermissible because "[i]t is not counsel's prerogative to determine finally the merits of an appeal, but, as directed in *Anders,* 'the court—not counsel . . . decide[s] whether the case is wholly frivolous.'" *Turner v. Haynes,* 162 W. Va. 33, —, 245 S.E.2d 629, 631 (1978). *See also, Rhodes v. Leverette,* 160 W. Va. 781,

239 S.E.2d 136 (1977); *People v. Feggans,* 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr. 419 (1967); *State v. Varner,* 692 P.2d 753 (Utah 1984); *State v. Shattuck,* 140 Ariz. 582, 684 P.2d 154 (1984); *State v. Duncan,* 57 Ohio App. 2d 93, 385 N.E.2d 323 (1978).

We similarly believe that it is ultimately the court's, and not counsel's, prerogative to judge the relative merits of an appeal; nevertheless, we do not believe that the case authority cited by petitioner compels a finding that the discussion rule is unconstitutional. For example, counsel in *Turner* concluded that his client's appeal prospects would be without merit and so informed his client. Counsel, however, did not provide his client with a copy of the trial transcript, and an appeal was never pursued. In addressing defendant's claim that counsel's actions deprived him of his right to appeal, the court held that, applying *Anders,* counsel did not fulfill his obligation to his client. The court reasoned that counsel—not the court—ultimately decided that the appeal was without merit. 162 W. Va. at —, 245 S.E.2d at 631. It is evident that the court in *Turner* was never even given the opportunity to decide whether it agreed with counsel's conclusion of lack of merit. This was the constitutional infirmity.

For a similar holding, *see, Allen,* 99 N.J. Super. 314, 239 A.2d 675, where the court also found that defendant was deprived of his right to effective assistance of counsel. The defendant was not informed by his attorney that he had the right to appeal or that he had the right to counsel to prosecute an appeal. Again, the court there was never given the opportunity to decide whether counsel's conclusion that the appeal was meritless was adequately

supported by case law, the record, or the applicable statutes.

To the contrary, when a court in Wisconsin is presented with counsel's conclusion that an appeal would be meritless and in addition has before it a summary of the case or statutory authorities which might compel that conclusion, it, and not counsel, decides whether the discussion of why the appeal lacks merit should be accepted. If the Wisconsin rule merely permitted counsel to summarily conclude that the appeal was meritless, without including even a perfunctory discussion of the applicable facts or case authorities in support of that conclusion, *see, e.g., Feggans,* 67 Cal. 2d at 448, 432 P.2d at 23-24, 62 Cal. Rptr. at —, the same concerns raised in *Anders* regarding the constitutional insufficiency of a mere conclusory statement of no merit might arguably apply. That, however, is not the situation here.

We interpret the discussion rule to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with "notice" that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit. Thus, we do not believe the rule requires an attorney to argue against the client; rather, we believe the rule requires an attorney to

fulfill a duty that co-exists with the duty owed to the client —that duty which is owed to the court. The court will be better equipped to make the correct decision about the potential merits of the appeal if it has before it not only the authorities which might favor an appeal, but also the authorities which might militate against it. The court, as *Anders* mandates, is still the final arbiter, and it alone has the responsibility to determine whether the appeal is, in fact, frivolous. Our decision does not deviate from that principle.

We believe that the Wisconsin procedure serves several useful functions. In addition to providing the court with assistance in its review of the record, it assures the court that counsel has "discharged his obligation to his client in a competent and professional manner." *Nickols,* 454 F.2d at 470. That is, the Wisconsin procedure assures the reviewing court that an indigent defendant is receiving exactly that type and level of assistance that a paying client would be receiving under similar circumstances. When the court has before it a reasoned summary of the law militating against further appellate proceedings, it can be assured that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law.

The Wisconsin procedure, once again, can be contrasted to that followed in *Anders,* where the attorney simply stated that an appeal would be frivolous and so informed the court in conclusory fashion. It was this conclusoriness that the court found constitutionally offensive in *Anders,* 386 U.S. at 742, because it was indicative of

or at least implied a lack of diligence and preparation by the attorney such that it was evident that the criminal defendant was not obtaining the same type and quality of representation that he or she was likely to obtain from private counsel. Since the Wisconsin procedure avoids the type of conclusoriness that *Anders* found offensive, the same concerns raised in *Anders* regarding the quality and equality of attorney representation are simply not as relevant here.

There is case support in other jurisdictions for the conclusion we have reached. *See, Caraway v. Texas,* 560 S.W.2d 690, 691 (Tex. Crim. 1978); *People v. Lowery,* 86 A.D.2d 537, 538, 445 N.Y.S.2d 992, 993 (1982), stating that "[a] mere mechanical statement that there are no valid issues that could legitimately be raised on an appeal is insufficient"; *Smith v. State,* 496 So. 2d 971, 974 (Fla. Dist. Ct. App. 1986); *Commonwealth v. McClendon,* 495 Pa. 467, 473, 434 A.2d 1185, 1188 (1981).

We reiterate that an indigent criminal defendant, while undisputedly entitled to receive the same level of representation that a paying defendant would receive, is not entitled to receive more than a paying client would receive. *See, e.g., Nickols,* 454 F.2d at 472-73. "When [the] attorney has reviewed the law and the record as an advocate and determines that there are no non-frivolous issues to be raised on appeal, the appellant has received what is constitutionally required." *State v. Horine,* 64 Or. App. 532, 548, 669 P.2d 797, 806 (1983).[6]

---

[6]Although involving a slightly different fact situation, *McClendon* is particularly instructive since it included a detailed

(Continued on following page)

A final consideration which we believe is important to our decision is one which has been alluded to already, namely, the discussion requirement serves as a significant administrative aid to the reviewing court. It first provides a basis for the reviewing court to judge whether an appeal is meritorious. The brief in support of appeal, combined with the "no-merit" discussion, gives the court far more than just a "cold record" to look at; rather, the court has before it both the arguments in support of an appeal and a statement which at least refers to case authorities or factual references which do not support an appeal. Thus, the court has a substantial base of authority to refer to in making its own, independent evaluation of the case. This makes it less likely that the court will overlook important legal authorities which would either support or militate against continued appellate proceedings. Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner. With an increase in the number of criminal appeals, this concern should be obvious.

(Continued from previous page)

statement regarding the "discussion of lack of merit" requirement. It stated that, "Once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has fully discharged his responsibility. The role of an advocate, insisted upon in *Anders*, refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal. Where counsel has in good faith satisfied that obligation and found the appeal to be wholly frivolous, he can do no more. We reject the view that his explanation of why there is no basis for an appeal should be interpreted as reflecting counsel's lack of concern in the client's cause. Nor can that fact be assigned as a reason for concluding that the client did not receive this constitutionally protected right of representation." 495 Pa. at 473-74, 434 A.2d at 1188.

Because we find that adherence to sec. 809.32(1), Stats., does not operate to deprive defendant of any of his constitutional rights, and given the other significant considerations we have enumerated, we affirm the constitutionality of the Wisconsin procedure. Therefore, the petition for a supervisory writ of prohibition is denied.

By the Court.—Rights declared.

SHIRLEY S. ABRAHAMSON, J. (dissenting). Our court rule requiring an appointed appellate defense lawyer in a criminal case to explain in a no-merit report the weaknesses in the client's appeal contravenes the *Anders* decision of the United States Supreme Court, complicates the already complex ethical dilemma faced by an appointed defense lawyer who decides that an appeal of the client's case would be frivolous, and is unnecessary to achieve the purposes which the majority believes justify the imposition of the requirement. Because I believe that our rule violates the defendant's sixth amendment right to effective assistance of counsel, and because I believe this court should respond by commissioning a study of a court rule when, as in this case, a challenge to a court rule reveals flaws in the rule, I dissent.

In *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court undertook the difficult task of reconciling the professional and personal integrity of appointed appellate defense counsel with the constitutional right of criminal defendants to the assistance of counsel. ABA Standards Relating to the Defense Function, sec. 4-8.3, Commentary (2d ed. 1980). The Court achieved this reconciliation by providing that counsel convinced of the frivciliation by providing that counsel convinced of the frivfrom the case by following certain procedures, including

filing a brief with the court that identifies "anything in the record that might arguably support the appeal." *Anders* appears to rest on the distinction between complete frivolity and absence of merit, the former justifying withdrawal, the latter not justifying withdrawal. *But see Cleghorn v. State,* 55 Wis. 2d 466, 475, 198 N.W.2d 577 (1972). *Anders* has been criticized as forcing appointed appellate defense attorneys to "brief the unbriefable," because a defense attorney who could find something in the record arguably supporting an appeal would not request to withdraw in the first place. ABA Standards Relating to the Defense Function, sec. 4-8.3, Commentary.

The *Anders* decision has drawn more than its share of criticism from courts, commentators and practitioners. Courts have interpreted *Anders* in a wide variety of ways and have adopted alternate mechanisms for dealing with the difficult dilemma at the heart of the case. *See, e.g., State v. Horine,* 64 Or. App. 532, 669 P.2d 797 (Ct. App. 1983); *State v. McKenney,* 98 Idaho 551, 568 P.2d 1213 (1977); *People v. Wende,* 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979). Commentators have found little that pleases them with the decision. *See, e.g.,* Hermann, *Frivolous Criminal Appeals,* 47 N.Y.U.L. Rev. 701 (1972); Pengilly, *Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal,* 9 Crim. Just. J. 45 (1986). Finally, practitioners find the *Anders* procedure either unworkable or distasteful or both.

Nevertheless, *Anders* is, as the majority points out, the "touchstone" of analysis in this case. *Anders* requires an appointed appellate defense attorney to act as an advocate even as he or she requests to withdraw from a case. The majority asserts that the discussion requirement in the

court rule at issue in this case keeps appointed appellate defense counsel in the role of advocate because it insures "that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law." Majority opinion at page 10. It is not, however, the requirement that counsel search the record and research the law that the petitioner objects to in this case, but rather the requirement that counsel then place before the court any arguments that he or she has discovered which militate against the client's cause.

The United States Supreme Court specifically noted that it did not intend to "force appointed counsel to brief his case against his client." Defense counsel should be the client's advocate, not adversary. *Anders,* 386 U.S. at 745.

The majority explains that appointed appellate defense counsel's inclusion of arguments against the defendant is necessary to put the court on notice that the arguments in favor of the client are frivolous and to assist the court to make a correct decision about the potential merits of the appeal. Majority opinion at pages 9-10, 12. As the court recognized in *Anders,* 386 U.S. at 745, however, appointed appellate defense counsel provides sufficient assistance to the court simply by pointing out the possible arguments for the client. Appointed appellate criminal defense counsel's request to withdraw in itself puts the court on notice that counsel considers the arguments in the no-merit brief frivolous. Once raised, frivolous arguments by their very nature should not be difficult for a court to evaluate on its own without counsel supplying case authorities or factual references which militate against the appeal. Consequently, I conclude that there is no need to require de-

fense counsel to assist the court by briefing the case against the client.

Counsel's filing a brief setting forth arguments against defendant's position is a task that benefits the court but not the client. Accordingly, such a task is more properly assigned to an amicus curiae than to an advocate. The *Anders* court condemned procedures that place appointed appellate defense counsel in the role of amicus curiae rather than in the role of advocate for the defendant. 386 U.S. at 744. The Wisconsin requirement that appointed appellate defense counsel who files a no-merit brief must discuss therein the reasons why the appeal lacks merit violates the plain meaning and clear intent of *Anders* by transforming appointed appellate defense counsel from an advocate into an adversary or an amicus.

The disenchantment with our rule evidenced in this case and the widespread disenchantment with *Anders* indicate that the dilemma of appointed counsel who does not wish to prosecute a frivolous appeal deserves additional study to devise a solution that is more satisfactory to counsel yet is equally sensitive to the rights of indigent defendants, to the responsibilities of appointed counsel, and to the needs of the judicial system.

In its rulemaking capacity this court has the power to authorize a study of the rule and its effect on appointed appellate defense attorneys who feel that their clients' appeals are frivolous but who nevertheless cannot dissuade their clients from prosecuting the appeals. Such a study is the kind of response that this court should consider when presented with a challenge that raises significant doubts concerning the wisdom of the rule, even if the constitutional

arguments against the rule do not persuade the court. Thus, I believe that even if the majority is convinced the rule is constitutional, it should initiate a reconsideration of the rule.

Accordingly, I dissent.

I am authorized to state that CHIEF JUSTICE NATHAN S. HEFFERNAN and JUSTICE WILLIAM A. BABLITCH join in this dissent.

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 86-0172-W

(Title omitted in printing)

NOTICE OF APPEAL
(Filed May 21, 1987)

TO: Marilyn L. Graves, Clerk
Wisconsin Supreme Court and
Court of Appeals
231 East, State Capitol
P.O. Box 1688
Madison, WI 53707

James McDermott
Assistant Attorney General
Attorney for Wisconsin
Court of Appeals
123 W. Washington Ave.
P.O. Box 7857
Madison, WI 53707

PLEASE TAKE NOTICE that the above-named petitioner-appellant, State of Wisconsin ex rel. Ellis T. McCoy, by Attorney Louis B. Butler, Jr., Assistant State Public Defender, appeals to the United States Supreme Court from the final judgment or decree of the Wisconsin Supreme Court, entered April 9, 1987, wherein the Wisconsin Supreme Court upheld the constitutional validity of Rule 809.32(1), Stats. (1983-84) which requires appellate counsel to state reasons in a "no merit brief" why the case lacks merit, pursuant to 28 U.S.C. § 1257(2).

Dated this 20 day of May, 1987.

Respectfully submitted,

/s/ LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth Street, Room 821
Milwaukee, WI 53203
Telephone (414) 227-4891

Attorney for Defendant-Appellant.

SUPREME COURT OF THE UNITED STATES

No. 87-5002

Ellis T. McCoy,

Appellant

v.

Wisconsin

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN.

ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

October 5, 1987